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BUSINESS LAW

A Working Manual of Every-day Law

BY

THOMAS CONYNGTON

Of the New York Bar; Author of "Corporate Organization and Management," "The Modern Corporation," etc.

WITH THE COLLABORATION OF

ELIZABETH A. SMART

Of the New York Bar

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PREFACE

In engineering, medicine, and almost every other department of human endeavor, there has been in the last few decades, marvelous development and achievement. In the law alone there has been no progress. We live under a cumbrous and archaic system that is exceedingly difficult to amend or to improve. Moreover, as a people we have a superstition that any kind of evil can be overcome merely by passing a law against it. As a result we are a law-ridden people. We are governed by the Constitution of the United States and the constitutions of our individual states; by the enactments of Congress and by the enactments of our state legislatures; by the ordinances of our boards of aldermen; by the regulations of boards of health; and by the orders and the rulings of many other boards, bureaus, commissions, and officials. With all this multiplicity of regulation, the ordinary citizen must exercise no small amount of care and study to avoid entanglement in the far-extended meshes of the law.

Yet from this unwieldy mass of law may be elicited certain guiding principles that everyone should know—general rules of conduct that will carry us safely past most of the difficult places. Knowing these, it is possible for a business man to go through life and so to shape his business course and his relations with his fellows as to have comparatively little to do with courts and lawyers. Courts and lawyers are necessary institutions—so are doctors and hospitals—but all of us prefer to avoid them as far as possible and as long as possible.

The theory of the law is admirable. The object of the law is to secure right and justice to all men. The practice and the application of the law through the courts, however, comes

sadly short of attaining these ends. It is the purpose of this book to explain the conditions and to point out as nearly as may be, how the individual may shape his conduct and manage his affairs so as to avoid the more serious legal difficulties.

Law in its modern manifestations cannot be studied without some reference to economics and sociology. The law awards compensation to injured workmen; it compels persons who erect buildings to make them sanitary and to provide modern conveniences; it compels the factory owner to provide appliances for the safety of his workmen; it prohibits combinations in restraint of trade. Much of the legislation of the present day consists in the application of these modern principles to the social and industrial life of the country.

In this work the authors have tried to prepare a manual of every-day law for the man or the woman who owns property, does business, and engages in affairs—a book of guidance which may save both time and expense. They have tried to make the statement of the law plain, concise, and non-technical, and to add to each statement such advice as would be given by a careful lawyer who desired rather to keep his clients out of the courts than to win cases.

Blackstone has said in his famous Commentaries that "the science of the law should in some manner be the study of every free citizen." If this work can make plain to its readers some of the practical features of the law under which we live, so that they may appreciate its virtues and know its faults, and from that knowledge may, by their influence and votes, strive to simplify its procedure and remedy its deficiencies, the book will have served its end.

THOMAS CONYNGTON
ELIZABETH A. SMART

New York City,
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BUSINESS LAW

Part I—The Law of the Land

CHAPTER I

EVOLUTION OF LAW

§ 1. Definition

The English word "law" has a variety of meanings. We talk loosely of the law of gravitation, civil law, common law, written law, ecclesiastical law, the laws of health, the laws of God, etc., etc. For the sake of clearness it is necessary in this book to limit the word to those rules of action and conduct which regulate our relations with our fellow men.

The legal definition of law is "a rule of action prescribed by the supreme authority," and to that is usually added, "commanding that which is right and prohibiting that which is wrong." This last part of the definition must always be qualified by the explanation that the words "right" and "wrong" in this connection are to be construed as *legally right* and *legally wrong*. At times what is legally right may be morally wrong, and at other times what is legally wrong may be morally right.

§ 2. The Origin of Law

It is impossible to imagine any state of society without some law, that is, some "rule of action." A solitary man in an uninhabited country might be said to be without law, but as soon as one other human being came into any relation with

him certain rules and customs would grow up to regulate their mutual rights, and these would soon have the form and the force of law. Children in their play have rules and customs to govern their actions. Among the students of every college there is a curiously complex system of rules and customs, rigidly enforced, which defines the rights and the duties of the different classmen and their relations to others in the college.

A simple people living in a sparsely settled country could get along with a minimum of law, but a highly organized people living in a densely populated country requires many laws. Strangers comment on the number of "Es ist verboten" signs in Germany, but a complicated system of law is the necessary consequence of a dense population and a highly organized social structure.

§ 3. Law and Liberty

Laws are a necessary evil incident to social existence. The lone man in a wilderness has complete liberty. As others join him, laws and established rules become necessary. Every law and every rule subtracts from the individual's previous liberty of action and circumscribes his freedom. On the other hand, the advantages of social life and achievement are great; therefore the majority of mankind are willing to pay the price, which is submission to law. The trouble comes from the fractious few who, while they enjoy the advantages of living in a civilized community, are not willing to pay the price, and who seek to evade the laws which are obeyed by others and which alone make the civilized community possible.

§ 4. Sources of Law

The beginnings of our legal system go back to the early history of our country when the colonists from England first established courts, and decided the cases that came up according to the principles of the law of England as it existed at

that time—that is, they utilized as much as was applicable to conditions prevailing in the colonies. This law was principally the famous "common law" of England that had grown up through the centuries. This fact was of great advantage to the colonists when the rights conferred by the common law were infringed by the arbitrary acts of the home government.

> They were able to show that the rights they claimed were conferred by the common law, and that the king and the parliament were seeking to deprive them of the common birthright of Englishmen.[1]

Most of the colonies had been established under charters—instruments which served as our written constitutions do now. Connecticut and Rhode Island continued to use colonial charters as substitutes for constitutions even after the Revolution. To the common law were added the enactments of the colonial legislatures that had been established in each colony. The power of these colonial legislatures was limited by the provisions of the charter under which the particular colony existed.

At the time of the Revolution the colonies adopted the Articles of Confederation, which left each separate colony to establish such government as it saw fit. The authority of these governments was expressed usually in a constitution which took the place of the old charter and in legislative enactments passed to supplement the constitution and to apply general principles to particular cases. Later, when the federal constitution was adopted, its authority became supreme, and as each colony joined the new nation the local governments were shaped according to the basic principles of the federal constitution. The common law, the state constitutions and charters, and the enactments of state legislatures, all gave way on any point that conflicted with the federal constitution. This subject is treated more fully in the two succeeding chapters.

[1] Cooley's Constitutional Limitations, Chapter III.

CHAPTER II

THE WRITTEN LAW

§ 5. Definition

The technical term "written law" means law that is embodied in constitutions, acts of Congress, of state legislatures, and of other bodies with legislative authority. In many countries all the governing law is this so-called "written law." Napoleon, who had a better title to fame in the code of laws to which his name is attached than in all his conquests, called together the persons most learned in law to reduce into one orderly compact body all the varying laws at that time prevailing in France. The "Code Napoleon" which was the result has from that time to the present day been the major law of France and is what we call "written law." No similar codification of all existing laws has ever been attempted in the United States, and our so-called "written law" is only a part of the body of law by which we are governed.

§ 6. Constitutional Government

Nevertheless in our country the written constitution is the basis of all law. This is true of the United States as a whole and also of each separate state. A written constitution is the fundamental law on which all other laws are based and to which they are all subject. A constitution has been explained as that written instrument which defines the powers of government and limits the exercise of those powers for the protection of individual rights. The power of Congress is derived from the Constitution of the United States. Each state legislature has only the power granted by the state constitution. "Con-

gress can pass no laws but such as the Constitution authorizes expressly or by clear implication."

§ 7. The United States Constitution

The Constitution of the United States is the highest authority in the United States. Next in rank come laws enacted by Congress in pursuance of the powers enumerated in the Constitution. For example, Congress has power to regulate commerce with foreign nations and among the several states, and under this authority it has passed the "Anti-Trust Law." On the other hand, the Constitution does not grant Congress any legislative power in regard to marriage and divorce, and for this reason Congress is not authorized to enact a federal law regulating divorces, however desirable such a uniform law might be. Under the present Constitution this matter is left to the discretion of the separate states, and divorce laws change as state lines are crossed.

At the time of the adoption of the Federal Constitution the separate states were very jealous of their rights. The makers of the Constitution held that the powers of the United States as a nation were to be limited, so as to leave to the separate states the maximum of sovereignty. Their purpose in drafting the Constitution was to define these limits to national supremacy with exactitude and carefully to mark out the powers of Congress beyond which it could not go. Fortunately, grants of power as expressed in the Constitution were couched in general language, and in interpreting their meaning the Supreme Court of the United States has, in many instances, placed a liberal construction upon them, so that Congress today is a far more powerful body than it otherwise would have been. For example, at the time the Constitution was adopted no one dreamed of the enormous power granted to Congress in the right "to regulate commerce between the states." The commerce between the states at the time the Constitution was

adopted was of little significance and the power to regulate was of small moment. With the vast extension of our interstate commerce, however, the congressional power of regulation has grown to tremendous proportions. The recent decision of the Court in regard to the constitutionality of the Adamson railroad wages law would seem to extend this power almost without limit.

The wonderful thing about the Constitution of the United States is that though it was devised over a century and a quarter ago, and though the changes in our country and in its modes of life, in its social relations, and in its methods of business have been tremendous, the old Constitution, with but few changes, still serves as the fundamental law of the land and chafes in but few places. Well did Bryce in his "American Commonwealth" say of it:

> The Constitution of 1789 . . . . after all deductions . . . . ranks above every other written constitution for the intrinsic excellence of its scheme, its adaptation to the circumstances of the people, the simplicity, brevity, and precision of its language, its judicious mixture of definiteness in principle with elasticity in detail.

§ 8. Laws of Congress

The legislative power of Congress is limited to specific objects enumerated in the Constitution. Congress has the power to "regulate commerce with foreign nations and among the several states, and with the Indian tribes," but has no power to pass any laws affecting a railway or any kind of traffic which operates entirely within a single state. On the other hand, Congress is authorized to "coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures"; this power gives us a system of coinage and of weights and measures which is uniform for the entire country. If ever we adopt the metric system it will be

through the action of Congress, under this constitutional grant of power.

Whenever Congress acts under a constitutional grant of power, the states are excluded from legislation on that subject. For instance, Congress has power to pass "uniform laws on the subject of bankruptcy," and when the present bankruptcy law was passed in 1898 it at once nullified all the existing state laws on the subject of insolvency. Laws passed by Congress *in pursuance of* its constitutional powers are superior to state constitutions and state laws.

§ 9. State Constitutions

At the time of the adoption of the National Constitution, each of the thirteen original states was exercising the powers of government under some form of written constitution. These instruments remained in effect, except in those particulars which were overruled by the Constitution of the United States. The newer states have adopted constitutions, and before the states were admitted it was necessary for Congress to accept the proposed constitutions. But within the limits of each particular state the state constitution is supreme. The state legislature cannot enact a law which goes counter to any of the provisions of the state constitution.

§ 10. Constitutional Amendments

It was intended by those who framed our system of government that amendment of the Constitution of the United States should be both difficult and slow. They did not intend that a majority of the voters should at any time amend the Constitution. They did not have such entire confidence in the wisdom of the common people as to be willing to empower a bare majority of the voters to set aside the constitutional provisions they had so carefully devised. So they provided that no amendment should be valid as a part of the Constitu-

tion unless it were first proposed by two-thirds of both Houses of Congress and afterwards ratified by three-fourths of the several states. As it was purposely made difficult to amend the United States Constitution, so most of the states have likewise made it more or less difficult to amend or to change their constitutions. In some states a convention for the special purpose of revising the constitution is called at stated periods; others leave to the legislature the calling of the conventions, while the usual plan is for the legislature to submit separate amendments to the people from time to time.

§ 11. Constitutions That Legislate

Constitutions are intended to be permanent, and therefore should lay down only broad principles. They should not be encumbered with legislation on any subject on which the policy or the best interests of the people are likely to change. The pressure for change has been quite as strong as the framers of the constitution foresaw.

At the present time many persons desiring to introduce reforms and to secure liberal legislation fret at the delays and the difficulties of overcoming constitutional impediments, and hence advocate making our constitutions, both federal and state, easier of amendment and less restrictive in their provisions. There is such a distrust today, moreover, of the wisdom of legislatures that in many of the newer state constitutions provisions have been incorporated that should have been left for legislative action. For example, the Constitution of Oklahoma provides that eight hours shall constitute a day's work throughout the state; that railways shall not charge passengers more than two cents per mile, while the corporation commission may exempt any railway in case its earnings are so low as to justify a higher rate; that railways shall have adequate, comfortable, and clean stations, etc. By incorporating such detailed legislation in a state constitution, its

function, which is to provide fundamental and basic law, is confused with that of the legislature, which is to provide laws for such specific subjects as hours of labor, rates of fare, and all sanitary details.

§ 12. Legislative Enactments

Next in dignity and authority to the state constitutions come the laws or acts of the separate state legislatures so far as they conform to the Constitution of the United States and the constitution of the particular state. Below that in dignity come the ordinances or laws of boards of aldermen and common councils in towns and cities. The law from all of these different sources—constitutions, laws of Congress, laws of legislatures, and ordinances of municipal governments—may be said to make up the body of what is called the "written law," in contradistinction to what we call the "unwritten law" which is discussed in the next chapter.

§ 13. Subsidiary Laws

In late years there has come into existence an immense additional body of written law consisting of the rules and regulations issued by boards of health, building boards, school authorities, and various bureaus and commissions. For instance, the Interstate Commerce Commission is empowered by Congress or the legislatures of the states to regulate particular matters. Moreover, the different transportation companies and the other corporations operating public utilities have the right to make reasonable regulations for the government of those using their facilities. Thus, in the aggregate, the "written" or "statutory" law comprises a vast number of legal and semi-legal enactments, from articles of the Constitution down to the rules of the trustees of the smallest school district.

CHAPTER III

THE UNWRITTEN LAW

§ 14. Definition

To the layman, perhaps, the term "unwritten law" is somewhat misleading. It is called unwritten law because there was a time when it was not written. As soon as men commenced to live in communities they found it necessary to conduct their intercourse and dealings according to rules, and these customs or uniform methods of doing things are supposed to be the foundation of what is now called the "common" or "unwritten law." For instance, when vehicles meet it is the custom in this country to turn to the right. This custom is not the enactment of any legislature, and yet it is practically a law, for if anyone driving a vehicle failed to observe it he would be liable for any damage that resulted in consequence. It might be possible to find cases where this particular matter had come up and received the ratification of a court decision, but in such cases the court did not make either the custom or the law; it merely recognized that the custom was general and hence had the force of law. That is, the court recognizes the custom as law because men have acted in one way until that way has become a rule of action; the court is bound by it although there is no written record. When so recognized by a court, it would be placed upon the court records and so would actually be *written down,* yet it is still called "unwritten law" because it is based on the earlier unwritten custom instead of upon legislative enactment. Lawyers distinguish these classes as *lex scripta* and *lex non scripta.*

§ 15. The Doctrine of Precedents

The courts do more than record customs; they create law by decisions that then become precedents. In primitive days when men had differences of opinion they would get someone older and supposedly wiser than the rest, to arbitrate or decide the matter. When a given matter had once been decided in a certain way, the inhabitants of the country would shape their conduct according to this decision; it would be a precedent for future action and future decisions and in this way would become part of the unwritten law. Gradually, as civilization increased and these precedents accumulated, a "body" of unwritten law grew up, founded partly on customs and partly on precedents established by the courts.

Moreover, if a question came before one of these early courts and no custom could be found on which to base the decision and no precedent to guide it, the judge would decide according to his ideas of right and justice and thus would add a new item to the sum of this unwritten law, which in turn would become a precedent for later cases like it. England has been eulogized by its poet laureate as:

> A land of settled government,
> A land of old and fair renown,
> Where Freedom broadens slowly down,
> From precedent to precedent.

§ 16. Court Reports

In the old days when writing was a rare accomplishment, individual lawyers used to make their own notes of cases in what were called "Common-Place Books," which they would use as authorities when similar cases were tried. In this way there grew up the custom of making court reports. Today the decisions of the courts are most carefully recorded and published, and the court reports are the greatest repositories of this so-called "unwritten law."

§ 17. The Volumes of Reports

The difficulty in our country at the present time is that we have over forty-eight different and independent systems of courts, all grinding out decisions, which are recorded and published in long rows of volumes. In the first place the number of reports has become so great that it is impossible for even the most industrious lawyer to keep up with them. The existing law reports of this country fill thousands of volumes, and every year they are growing in number and complexity. In the second place, there are forty-eight separate jurisdictions, the decisions do not always harmonize, and then occurs a conflict of laws.

Lawyers depend on large law libraries, kept up usually on a co-operative basis, to which they have access. Meanwhile, they subscribe for volumes of digests and use encyclopedias of law to guide them in their searches through this ever-increasing maze of judicial decisions. In each state the decisions of the highest state courts are paramount, and the lawyers in the state try to familiarize themselves with at least the trend of these decisions.

Whenever political, economic, and social conditions change so radically that the decisions of the higher courts become unjust or restrict legitimate activity too much, the state legislature interferes and enacts laws that supersede the judicial decisions. In other words, the written law prescribed by the legislature overrules the unwritten law that comes from the decisions of the court.

§ 18. The Common Law

This unwritten law was also called, as has been said, the "common law," and old-school lawyers were fond of extolling it as the perfection of human wisdom. When this country broke away from England at the time of the Revolution we retained the English common law, and it became the founda-

tion of the general system of law prevailing throughout most of this country. In Louisiana, however, and to a certain extent in Texas and California, the so-called Roman or "civil law" was introduced and became largely the foundation for the systems of law in those states. This system, based on the old Roman law, prevails in Italy, France, and other Latin countries in Europe and is utilized by the Teutonic peoples as well. The English law is indebted to the Roman system more than English common law advocates are willing to admit, and it might have been better had more been borrowed.

The original English common law was a harsh and barbarous code, having little or no consideration for the rights of women and children and making man the tyrant of the family. Any infractions of its provisions were punished with drastic penalties. The smallest theft by man, woman, or child, was punished by death. At the present time most of the harsher features of the common law have been eliminated. Juries refused to convict prisoners on account of the cruel penalties and the law has been modified by numberless legislative enactments and expanded by judicial construction, to fit a more civilized and cultivated society than that in which it originated.

It is evident that the term "unwritten law" covers a wider field than "common law." Therefore it is used in this work to designate the law that is contained in the reports of the courts.

§ 19. Unconstitutional Laws

It frequently happens that a legislative enactment designed to overrule some objectionable decision of the courts comes into conflict with a provision of the state constitution or of the United States Constitution and the courts may decide this new law to be unconstitutional. If the people in the state should still desire to maintain the legislative enactment, they would

have to amend the state constitution. In case the law were in conflict with the Constitution of the United States, the people must either submit or else undertake the very arduous task of stirring up all the people in the country to amend the federal Constitution.

A notable instance of this is the income tax law, which was passed by Congress but declared unconstitutional by the Supreme Court. Then the Constitution was amended, whereupon Congress passed the present income tax law which, with its amendments, will doubtless be a permanent feature of our system of taxation.

§ 20. The Recall of Judges

Within the last few years many persons have become impatient with the slow process of changing the Constitution. This has led them to advocate, as a short cut to securing better laws, the recall, that is, the dismissal, of any judges who decide that popular laws are unconstitutional. If this law went into effect any judge who rendered decisions opposed by the majority of the voters could be recalled and a more subservient arbitrator elected. For several reasons such a procedure seems unwise. It would be better to facilitate the process of amending the Constitution than to seek judges who will disregard the plain letter of existing law and will support, as legal, laws that plainly are not in harmony with the provisions of the Constitution. But this is too large a subject for treatment here.

CHAPTER IV

LAW AND EQUITY

§ 21. Remedial Law

When anyone has suffered wrong and his legal rights have been infringed, he seeks a remedy. The law itself may be ideal, but if the machinery to enforce the rights defined by the law be defective, abstract perfection will avail but little. Therefore a study of what is called remedial law is necessary before we can tell what real help we are likely to obtain from the law. The "law's delay" is proverbial. In all matters of judicial procedure there has always been a tendency to formality and "red tape." Too often this tendency becomes so excessive that it nullifies the remedy and results in a denial of justice. The remedy may be so costly and long deferred that it were better left unsought. The man with limited means is too often, on this account, barred from seeking justice.

Suits or actions to redress wrongs or to enforce rights are classified as suits at law and suits in equity. It is not easy to explain briefly the distinction between "law" and "equity" as they are used in our administration of justice. The two words are used in this connection without any reference to the ordinary meaning attached to them. A real, technical distinction exists between a case at law and a case in equity which a lawyer must thoroughly understand. Whether it would pay a business man to study out the exact and full distinction between the two is doubtful. But, as it is impossible for a lawyer to avoid using the terms in their technical sense, it is important that the layman should have a general idea of what the lawyer means, so that the plain man may not be misled

by confusing the ordinary English use of the words with the legal signification.

§ 22. Equity in the Legal Sense

In England many years ago the proceedings at law had become so cumbersome and so limited in scope that it was difficult to obtain justice in the courts of common law. King Henry VII then provided that in those cases in which the common law did not afford a remedy, relief could be obtained by applying directly to his chancellor. This official, who was also a dignitary of the church, favored the Roman or civil law and adopted a procedure founded on that law in contradistinction to the common law. Such a procedure before the chancellor was called a suit in "chancery" or "equity," as distinguished from the procedure "at common law" or simply "at law." It should be noted, however, that while at first it was simpler to bring a suit in equity than at law, this distinction soon vanished and equity proceedings became even more complex and technical than the procedure at law. The chancellor, however, gave relief in many cases for which the common law gave no remedy. The common law was adapted to a simple life and a crude social system. As the English people advanced its deficiencies were manifest and the introduction of the courts of equity was a long step in legal reform. The two distinct systems both continued, the procedure was different, the rules were different, and the relief given was different. The lawyers who practiced before the chancellor were called solicitors; the lawyers who appeared in the common law courts were counselors or barristers.

In equity the remedies are different from those provided by a suit at law. To illustrate the difference, if anyone breaks down your fences and makes a road across your property, at *law* you can sue for damages; in *equity* you can ask an injunction restraining the offender from further trespass.

§ 23. Suits at Law and in Equity

The distinction between law and equity was brought to this country and as a result there are in all the states the divisions of the work of the courts and the two methods of bringing suit. In a few states the law and the equity courts are kept entirely separate, as is the case in New Jersey; and in these states the public realizes more readily the real difference between law and equity administration. But in most states today, the actions are brought in the same courts, the only difference being in the preliminary procedure, the remedies which the courts grant, and in the fact that in most cases at law there is a jury trial, while in equity cases a judge or judges alone hear the case.

A court of law hears both civil and criminal cases. Civil cases are the ordinary suits about contracts and property rights and are brought by private parties against other private parties. Criminal cases are suits brought by the state itself against offenders who have broken the law, and who are punished by fine or imprisonment. In such a case the fine goes to the state. (See Chapter V.)

A court of equity hears only civil cases. If a person is interfering with another's rights, a court of equity will grant an injunction forbidding him to do so in the future, and will at the same time make him pay damages to the injured party for the wrong which has already been done.

§ 24. Bringing a Suit at Law

When A refuses to pay a debt that is due, or fails to do what he has contracted to do, or by his negligence or wrongdoing has caused damage to B, if B wishes to bring suit against A he employs a lawyer who prepares a written statement setting forth his client's cause of action. This paper is called a complaint and must be served upon A. At the same time with or before the service of the complaint, B must serve a

notice or summons on A requiring him to answer within a certain number of days. If A does not appear, the court will consider that A does not mean to defend and, in some instances, if the claim is definite, it will grant a judgment by default against A and in favor of B, without a trial or anything more than a sworn complaint to prove the case.

The party bringing the action is called the "plaintiff," in some states the "complainant." The party against whom the action is brought is called the "defendant." The written papers by which the parties bring their cause before the court are called "pleadings." If the defendant does not wish to allow judgment to go against him by default, he or his lawyer must within the time set serve an answer to the other party's complaint upon him. In this paper the defendant usually brings forward any cause of action which he may have against the other party. This is called a counterclaim. If the defendant denies the facts alleged or sets up a counterclaim, the pleading is called an answer.

The other party then replies to the counterclaim. There may in some states be several such replies after the service of the complaint. The procedure depends on the law of the particular state where the action is being brought. Each party must serve a copy of each paper in the action on the other party or his attorney.

If what has been stated in the complaint does not make a legal cause of action, the defendant through his lawyer may object to it by filing a demurrer. A demurrer objects to the complaint on legal grounds; for example, that it is not brought in the right court, or that the facts alleged, even if true, do not constitute a cause of action.

Then the matter of the demurrer comes up before the court. It is argued by the lawyers on each side, and if the court decides that the demurrer presented by the defendant is well taken, the complaint is dismissed. The plaintiff can then

usually get leave (by paying the costs up to date) to file a new complaint in which his lawyer will try to avoid the particular legal difficulty.

If the court decides, however, that the demurrer is not well taken, it is dismissed, and this leaves the defendant to answer the complaint as to the facts, that is, as to the matters which have been alleged on the part of the plaintiff and denied on the part of the defendant.

The foregoing statement of proceedings before trial presupposes very simple proceedings, but usually there are requests to amend and much incidental procedure, which tend to delay the trial of the main issue.

§ 25. Trial at Law

When the parties have finally *come to an issue,* i.e., when the plaintiff has alleged certain things and the defendant has denied them or has interposed a defense, then the case is set down for trial, and takes its place on the court calendar. When the cases that are ahead of it on the calendar have been tried, or postponed, the case is called and the lawyers on each side are asked if they are ready. When both sides are ready, or have no excuse for longer delay, a jury (if it is a law and not an equity case) is assembled and the judge proceeds with the case. In a court of law a party has a right to have a jury decide any disputed facts.

The witnesses for each side are sworn and testify, then the case is argued by counsel for each party and goes to a jury to decide or is decided by the judge, or is taken under advisement by the judge, who will give his decision after due consideration. If the case goes to a jury, the jurymen are placed in the custody of a court officer until they reach a decision or find that they cannot agree. If the judge is to decide the case and takes it under advisement, it may be days, weeks, or months before he will render his decision.

Since a jury is composed of human beings, it is likely to show certain very human characteristics in its decisions. The sympathies of the jury are usually with the under dog, whether he is plaintiff or defendant. Often the plaintiff, by the mere fact of going to court with his troubles and then by being heard *first,* has the better chance. If one party is a corporation, the jury is inclined to regard it as a soulless oppressor, and to award damages in favor of the poor workingman, widow, etc., whom the corporation is supposed to be injuring.

Very frequently clever and unscrupulous lawyers get in some touch to appeal to the sympathies of the jury, as a photograph of an injured man's wife and children, etc. These are usually ruled out by the court, but the effect on the jury has been gained just the same. It is to be remembered that if one man on the jury is stubborn, prejudiced, or dishonest, he can prevent a verdict and the whole expense and trouble of the trial has to be repeated. The law frequently breaks down in vindicating rights on account of the imperfect workings of the jury system.

Notes:

1. Consider all the chances before bringing a lawsuit.

§ 26. Bringing a Suit in Equity

The outline given applies to a court of law. If the court is a court of equity jurisdiction, the procedure is essentially the same except that the first statement may be called a petition or a bill in equity. In New York complaints are also used in equity. All procedure in courts follows generally the lines laid down, with many variations as to details and incidentals.

A suit in equity can be brought only when the party cannot obtain justice at law. The other party must answer the petition or the bill. Copies of all papers must be served on the opposite party by the party making the charges.

In a suit in equity, only a judge, or several judges, hear the case. For this reason a court of equity is not so strict about keeping out evidence that does not properly have anything to do with the case, or that might prejudice a jury. The judge is supposed to know the law and to be guided only by such evidence as ought to be allowed to affect the decision of the case.

A court of equity tries to give a remedy to fit the nature of the wrong that is being done. If the wrong consists in a refusal to perform a contract, the court will, in some instances where the contract should be performed, compel the offending party to carry out his agreement. (See Chapter XII.) If the wrong alleged consists in the defendant's continuing to do anything which is injuring another, the court will issue what is called an injunction forbidding the continuance of the injurious conduct. Practically speaking, however, the courts are chary of granting an injunction where it may be avoided.

It is useless to attempt to bring an action in equity unless the party is certain that he can prove to the court that the damages which he can obtain at law will not conpensate him for his injury, and unless he is willing to do everything which the court may require from him in the interests of justice. The maxim is that he who seeks equity must do equity.

Another maxim in equity is that he who comes into a court of equity must come with clean hands, i.e., if the complainant alleges fraud, he must show that he has been scrupulously fair in all his own dealings.

If the party resorts to equity when he should have instituted an action at law, he will merely find that he is obliged to go to the expense of bringing another action at law. The practice in equity is no less complicated than that at law.

§ 27. Appeals to a Higher Court

The decision of a trial may be appealed from by the dissatisfied party. The unsuccessful litigant has to pay the dam-

ages adjudged to be due his opponent, the costs of the suit, and the fees of his own lawyer. His fighting blood is stirred by the evidence that brings to mind the original dispute and the perverseness of the opposite party, by the arguments of the counsel on each side, and by the failure of the court and jury to give them the weight he feels they have, and he feels as if he would spend all he has to vindicate himself and to punish those who have wronged him.

His lawyer feels much the same way, and, as he is paid for appealing instead of having to pay, he can better afford to indulge his feelings. Usually the first thing is to file exceptions to the alleged irregularities in the trial; that is, happenings of the following nature:

That evidence was admitted which should have been shut out.

That evidence was rejected which should have been admitted.

That questions were allowed which should have been barred.

That questions were disallowed which should have been allowed.

That the judge charged the jury in a way he should not have charged it.

That the judge refused to charge the jury as requested and as he should have charged it.

That the verdict was excessive or inadequate or not supported by the evidence.

Then a motion is made for a new trial and, when this is overruled, counsel announces that he will appeal.

The appeal is a costly and complicated proceeding. All of the papers and much, in some cases all, of the evidence must be printed. Then the arguments of each of the opposing

counsel, ironically termed "briefs" are printed. After more delay and often much sparring of counsel over points of procedure, the case will take its place on an appeal docket and in due course will be reached by the appellate court. Next the case is heard, which means that counsel for both sides appear and argue the case on appeal. Finally the court takes it under consideration and if a new trial is granted it must be tried again in the original court. In most states there may be indefinite appeals until the case has reached the court of last resort, been decided there on the last technicality, and a rehearing has been asked for and refused. There is always delay between each appeal, and it is entirely possible for a lawsuit to go on for years and become an heirloom, which is handed on from generation to generation. It will be seen that the person or the corporation with the longest purse has a great advantage. They employ more experienced and able counsel and they can stand the mounting costs better than the person who has nothing but a just cause.

Attempts have been made from time to time to simplify procedure and to make litigation less costly and less dilatory, but so far without any great measure of success. To laymen both courts and counsel often appear much more concerned in observing the rules of the game than in administering justice as between man and man. As stated in a recent legal periodical: [1]

> While every other profession has been practically made over in the past twenty-five years, the conservatism of the legal profession has stood in the way of substantial changes in the rules of procedure and practice.

Notes:

1. Before becoming involved in litigation reckon the cost to the limit of the last appeal.

[1] *Case & Comment for July, 1917.*

§ 28. Advisability of Litigation

There are circumstances under which it is necessary to go to law and then its advisability is not open to discussion. Such circumstances may be compared with cases in which surgical operations have become imperative. The only question then is to be sure that you secure a skilful attorney to represent you. But many cases arise where there is strong temptation to bring suit, but where it might be more prudent to compromise or settle by other means. What follows applies to these debatable cases.

When you feel that you have been wronged and consult a lawyer, you want him to sympathize with you, to assure you of the merits of your case, and to advise you to show the other party that he cannot ride rough-shod over you. This is the lawyer's selling talk that you expect. You tell him to go ahead and cheerfully give him a check for a few hundred, which he says will be plenty to keep things moving until the case comes to trial.

If instead, he tells you judicially that, while you have a good case, it will save time and money to compromise in some way rather than to litigate, you take it as an unfriendly act, grudge him his modest fee for saving you a lawsuit, and tell your friends that he is too cautious ever to make much at the bar. Next time you have trouble you think you will find a lawyer with a little more sand.

Lawyers know that most men who consult them feel this way. As one lawyer expressed himself, it is easier to get a $1,000 fee for trying a case than $100 for effecting a compromise. Therefore do not expect that your lawyer is going to punish himself to do you an unwelcome service. You can try this plan. Ask your lawyer to make you an estimate of what the case will cost in counsel fees, preparation for trial, court costs, and incidentals. Then inquire as to what amount of your time will be required for consultation, attend-

ance on trial, waiting for case to be called, etc. Estimate what your time is worth in your business and add to previous amount. Estimate how much thought and worry you will put into it and how much this will detract from your business efficiency. Assume you get judgment in your favor and the case is not appealed. How does the account stand?

You may have a good case and still lose out. Such things have happened. Appeals are possibilities. There is a chance of heavy costs and fees. Consider all eventualities before you decide on your course.

Notes:

1. Prevention is better than cure. "Beware of entrance to a quarrel."
2. Calculate your costs in advance. This discourages litigation.
3. Tell your lawyer you would rather pay him to keep you out of litigation than to win your case. If he is young at the business he may take you at your word.

CHAPTER V

CRIMINAL LAW

§ 29. Criminal Procedure

Criminal law is administered in a manner different from the usual procedure at law and in equity. The state prosecutes for crime, and, while the accused person is called the defendant, there is no plaintiff save the state. The designation of a criminal case might be: "State of Ohio v. John Doe (name of accused)." In the different states there is more or less variation in the administration of criminal law.

Criminal prosecutions are usually instituted by a warrant sworn to by the aggrieved party before a magistrate. The magistrate then summons the accused person to appear or issues a warrant for his arrest. In minor cases the magistrate tries the person, or in some instances the accused may demand a trial by jury. Where the offense is serious, the magistrate has only jurisdiction to commit the accused to await the action of the grand jury. In most cases the accused person is allowed to give bail for his appearance when the grand jury meets.

Serious crimes must always be prosecuted by indictment; i.e., a written accusation authorized by a grand jury. The grand jury consists of eighteen men and is convened from time to time in each county to investigate any charges of crime that may be brought before it. Proceedings before a grand jury are, of course, *ex parte*, i.e., only one side is heard. These proceedings are under the supervision of the legal representative of the state, the prosecuting attorney. The object of the grand jury investigation is to ascertain what

persons should be tried before a trial jury and whether the evidence against people accused of crime is sufficient to justify the state in prosecuting them. If an indictment is found and the person has not been arrested, the authorities try to arrest him. The names of all who are indicted are placed on a criminal docket to await trial before a trial jury. The grand jury system is painfully cumbrous.

In many states criminal procedure has become so complex and so overridden with technicalities that any criminal who can afford to pay skilful counsel may escape all penalty except the large payments he makes to his own lawyers. The difficulty of convicting a wealthy criminal is the scandal of our legal administration of justice.

§ 30. Classes of Illegal Actions

It is well to know that offenses against the criminal law are divided into two classes: crimes and misdemeanors, according to the degree of the offense.

A crime is a grave offense, punishable by heavy penalties. A misdemeanor is a lighter breach of the law and is punishable by lesser penalties.

Burglary—the breaking into a house after dark—is a crime and is punished by confinement in a penitentiary. Driving an automobile too fast is a misdemeanor and may be punished by a fine or confinement in the county jail.

Criminal offenses are also divided into two classes: those which are wrong in themselves and those which are wrong merely because the law prohibits them. In order to make this distinction easier to keep in mind, lawyers use the Latin terms *"malum in se"* (wrong in itself) and *"malum prohibitum"* (wrong because it is prohibited). At the present time there are a great many naturally indifferent actions which have been made into crimes by the procedure of the legislature, and there is such a multitude of these laws that it is

very hard for anyone even with the best intentions to avoid violation of the law at some time.

§ 31. Penalties

The penalties for violation of the criminal law are fines, imprisonment, and, for a few offenses, death. In this country the Constitution of the United States prohibits banishment and forbids cruel and unusual punishments.

Part II—Contracts[1]

CHAPTER VI

ESSENTIAL FEATURES OF A CONTRACT

§ 32. Introductory

Civilized life may be said to be founded on agreements. Whenever an individual buys or sells something, he makes an agreement. Our whole social and business life is based upon a series of understandings with those with whom we come in contact. The more complex our civilization becomes, the more agreements are made and the more extended become our contractual relations.

Whenever an agreement is of such a nature that it may be enforced in a court of law, it is called a contract. Most of the laws on our statute books and most of the laws affecting the daily life of the individual have to do with the subject of contracts. The sale of goods is a contract, the appointment of an agent is a contract, and the business done by an agent is that of making contracts. Insurance, whether of life or of property, is a contract; partnerships and corporations are both based on contracts; in fact, there is no business relation but is either itself a contract or else is based upon a contract.

§ 33. Definition

A contract is defined as an agreement between two or more parties, for a sufficient consideration, to do or not to do

[1] For forms of contracts, see Chapters LXXXI, LXXXII, Forms 1-15.

some specified thing or things. This is the accepted legal definition of a contract.

It is an agreement, and the minds of the parties, to use the technical phrase, "must meet."

There must be *two* legally competent parties to a contract; there may be many.

There must be a consideration, without which there can be no legal obligation. If a man agrees to do something, there must be a valid reason or inducement for him to bind himself. This, in legal parlance, is the consideration. If the promise were gratuitous, that is, if there were no inducement for the promise, it might be a matter of honor to carry it out, but it would not be a matter of legal compulsion. A naked promise, without consideration, cannot be enforced in a court of law.

There must be the obligation, or thing to be done. This promise may be to pay money, to do work, or to deliver goods; or it may be merely not to do something which the person contracting had a right to do.

§ 34. Essential Features

In order to make any agreement legally enforceable as a contract, there must be the following essentials:

1. The parties to the agreement must be legally competent to contract.
2. The agreement must be to do something lawful.
3. The parties must agree to the same thing.
4. There must be a sufficient consideration.

These several elements of a contract will be explained in the following sections.

§ 35. Competency of Parties

Generally all persons are able to bind themselves by contract. It is a positive right. But there are exceptions to

the general rule. Certain persons are not competent to contract, and certain other persons have only a qualified right to make contracts.

If a person has been legally declared a lunatic or a spendthrift, and a guardian has been appointed by the court to look after his property, such person has no power to enter into a binding contract. No agreement made by him could be enforced, even though the person dealing with him did not know that he was insane or a spendthrift and had been legally declared incompetent. There is one exception to this rule—a contract to buy absolute necessities for life and health. A person may supply an insane person with necessary things and will be legally entitled to payment for them.

As it is necessary for a party to give his free consent to an agreement and to know what he is consenting to, intoxicated and insane persons who have not been legally declared to be such, cannot make enforceable contracts if the insanity or the intoxication prevents them from understanding the nature of their acts at the time the contract is entered into.

The Law Varies with Location. This question of competency depends on the law of the place where the contract was made. If a person legally declared a spendthrift should go into another state, he would be perfectly capable of making contracts there until he has been declared a spendthrift in the courts of that state. A person legally declared insane, if he had lucid intervals, might in a state other than that in which he had been declared insane make an enforceable contract in a lucid interval. The age at which a person becomes legally competent to contract varies in different states. The local law should always be consulted.

Indians. Indians living on government reservations are protected by the federal law, and may make enforceable contracts only under such conditions as that law prescribes. If they leave the reservations and enter into ordinary business

relations, they are usually held liable in the same way as any other business men.

Married Women. A married woman does not have entire freedom of contract. As a usual rule a married woman cannot make an enforceable contract with her husband. Formerly a married woman could not make a contract at all without her husband's consent, but this has been changed. It is safest to consult the law of the state in which one resides before entering into a contract with a married woman, as a few states still give her a measure of irresponsibility. A married woman may, in any state, act as an agent for her husband. (See § 390.)

Minors. Minors (persons who are under legal age, which is generally 21) have only a qualified ability to make contracts. That is to say, the minor may make a contract but the other contracting party cannot enforce it if the minor chooses not to perform his part. The minor may even annul the contract after it has been performed, return the property and demand his money back, or vice versa. If the minor has taken a fraudulent advantage of the other person by leading that person to think he is of full age, the law will later prevent the minor from stating that he is under age when he comes into court, and will therefore make him perform his agreement. If under the contract the minor has received property or money from the other party, he will be made to repay or to return it if possible; but if he has spent or otherwise disposed of it he may, as a rule, still refuse to pay for it.

People dealing with young persons are supposed to look out for their own interests and to find out whether such parties are of age or not. The minor, because of his inexperience, is guarded by the law not only against the designs of other persons but also against his own carelessness. He is not, however, guarded against his own wrongdoing. If he injures property he will be obliged to pay damages.

After a minor has come of age he may confirm any contracts made while he was a minor. He may do this either by words or by acts. If he keeps the property obtained under such a contract for an unreasonable length of time, however, the court will consider that he has confirmed it. Moreover, unless the minor pleads his infancy in court, a contract may be enforced against him the same as against any other person. No one else may plead this for him. If he becomes insolvent, a receiver of his property may not call off any of his contracts for him, no matter how unfair. If the minor himself chooses to stand by them, they are legally binding.

Notes:

1. It is not safe to have any business dealings with a minor.

§ 36. The Subject Matter Must Be Lawful

The subject matter of a contract is that which the agreement is about. It may consist of any property, commodity, or service which could be the subject of a business transaction, or it may be to do or not to do something, such as to pay for the privilege of naming a child, or to pay a young man to abstain from using tobacco.

An agreement to do anything contrary to law would be unenforceable. An agreement to do anything which, while not directly contrary to any special statute, would be injurious to the peace and good order, the health, or the morals of the community, would be against public policy and would be unenforceable.

The following agreements would be contrary to public policy and therefore unlawful:

1. An agreement to prevent a person from marrying or to break up a marriage.

2. An agreement to persuade one person to marry

another; for instance, the Jewish custom of arranging marriages through marriage brokers.

3. An agreement in restraint of trade. The Supreme Court has decided that agreements in *reasonable* restraint of trade are not contrary to public policy. Where a person sells out his business to another he may agree never to engage in that business again within certain reasonable territorial limits —usually the limits of the territory which his business actually covered, unless it covered the entire country.

4. Gambling contracts. Contracts for the buying and selling of "options" and "futures" and of stock "on margin," are regarded as gambling contracts in some states, and will not be enforced unless the party selling the stock was in some way entitled to it or was selling it as agent for the real owner.

Fire insurance can be taken out on property only by a party who has some interest in it, and life insurance only by the party insured, his wife, child, or some other person who would be entitled to support, or by a creditor who had a claim against the person whose life was insured, or by a business partner or employer. Otherwise it would merely amount to a bet as to whether the property would be destroyed or when the person would die.

5. Contracts in which usurious interest is charged. Sometimes the contract itself will be enforced, but the party will be prevented from collecting interest; sometimes he will not be allowed to enforce any part of the contract.

6. Contracts to commit a fraud or a crime.

7. Contracts for the sale of adulterated goods.

8. Contracts to bribe public officials, or contracts of bribery with such officials.

9. Agreements by candidates to appoint persons to positions in case said candidates are elected, or to do anything else in return for aid in securing their election.

10. Agreements not to prosecute a person for a crime.

All of these last cases are contrary to public policy because the subject matter pertains to something unlawful and injurious to the community.

11. An agreement made in advance not to take a dispute into court. The law favors the settling of disputes out of court as much as possible; but it is contrary to public policy to deprive any man in advance of his right to be heard in court whether by agreement or otherwise. But, while two parties may not contract to refrain from taking a possible disagreement to court, they may contract to arbitrate in a specified manner before the court is resorted to.

12. A contract to perform services in return for money made by a medical student before he has been licensed, by a law student before he has been admitted to the bar, or by any other person who is required by the law to submit to certain requirements before being licensed to practice his profession or vocation and who is not yet so licensed, is void; any fees which may have been agreed upon cannot be collected.

When an illegal contract has been made, the courts will refuse to interfere at all. The parties are simply left as they are, to straighten the matter out as best they can.

The Law of Place. The law which governs a contract is the law of the place where it was made. If it is to be performed elsewhere, the parties may, if they wish, expressly state that it is made in conformity with the law of the state where it is to be *performed,* provided they do not do so in an attempt to evade the law of the state where it was made. A contract made in good faith to be performed elsewhere need not comply with the law of the state where it was made if there is a conflict between the two laws, but the fact that it is to be governed by the law of a state other than that in which it was made must always be expressly stated in it. (See also § 58.)

The Subject Matter Must Exist. There must be some

subject matter in existence to contract about. If the contract were to add a wing to a house and the house were burned down at the time of the agreement without the knowledge of the contracting parties, there would be no contract. If, however, the contract was about something that has been lost or destroyed but that might be replaced, such as a contract for the sale of grain, the contract is valid and the party who agreed to deliver the grain must procure it elsewhere.

Notes:

1. A contract to do anything unlawful cannot be enforced.
2. No money paid on such a contract can be recovered.
3. No services so rendered can be made the basis of a suit.

§ 37. Agreement of the Parties

It is essential that the parties to a contract should agree on the terms; or, in legal phraseology, that "their minds should meet." This agreement results usually from an offer made by one party which is accepted by the other. The offer or proposal may be oral or written, and the acceptance may be oral or written. The simplest form of contract is an offer to sell goods at a specified price and an acceptance of the goods at that price. If this offer is made by letter and the acceptance is made by letter, the two letters taken together constitute a complete contract of sale. Some other points might be mentioned, but these the law will supply. When nothing is said as to terms, the law implies cash. When nothing is said about delivery, the law implies that the buyer will be entitled to delivery when he pays the price. (See Chapters LXXXI, LXXXII, Forms 2, 9, 11.)

Acceptance by Mail or Telegraph. If the party making the offer requests an answer by mail or telegraph, the post-office or the telegraph company becomes his agent to receive

the acceptance, and the agreement becomes effective the moment a properly stamped and addressed letter of acceptance is deposited in the mail box (even though the letter does not reach its destination) or the moment a prepaid telegram (unless the other party had directed that it be sent "collect") with the proper address, is given to the telegraph company to be sent.

The point is important because the person making the offer has a right to withdraw it if he informs the other party of his change of decision before the other party has accepted, i.e., has put a letter in the mail or has sent a telegram of acceptance. In other words, a contract may be complete *before* the acceptance is actually received, and it is then too late to withdraw the offer.

If a party makes an offer by mail or telegraph, he is regarded as having requested a reply by the same means unless he expressly asks for a reply in some other way; so that if the party receiving the offer replies in the same way, his acceptance becomes effective from the moment he mails it or gives it to the telegraph company to send. If, on the contrary, he replies in some other way, there is no agreement *until the answer actually reaches the other party.* In this last case, if the first party sends a letter withdrawing the offer and this letter arrives at its destination before the letter of acceptance reaches the first party, there is no agreement.

Manner of Acceptance. The offer must be accepted in accordance with its terms. To accept an offer in any terms other than those in which it was made amounts to a refusal. The first party may decide to accept the new terms, in which case there will be a new and different agreement, but he has the privilege of rejecting the proposed contract entirely. If the offer was made to one person only, another could not accept it; if made for a limited time, it must be accepted within that time. Advertisements offering a reward for the

return of lost articles are made to the public in general and the offer may be accepted by anyone who finds the goods. An offer cannot be accepted, however, after the party who made it dies or becomes insane, and it must in any case be accepted within a reasonable time; people cannot be held to offers made long ago and forgotten, or after the circumstances which led to the offers have changed. What constitutes a reasonable time will depend on the circumstances. The party who makes the offer may set a time limit for its acceptance, after the expiration of which the offer is no longer open for acceptance. It is always prudent to accept a desirable offer promptly.

Verbal Agreement. In many cases of contract the parties agree upon the terms orally by discussion, proposal and counter-proposal, suggestion and objection, until they think that they have arrived at substantial agreement. At this stage the contract should be reduced to writing. When this is attempted it will usually develop that each party has understood the discussion differently and a renewed discussion results. Finally, when the written agreement is agreed to by both, it is signed; and then it supersedes all understandings and binds the parties.

In most cases an oral contract is as good as a written one except that it is harder to prove. After a discussion of terms each party has a different impression of the conclusions reached. Certain parts deemed favorable by a party are most strongly impressed upon his memory, while other parts not so agreeable are not so well remembered, and after a year or so two men can honestly go into court and swear to absolutely contradictory accounts of the same transaction. Here the great advantage of the written transaction becomes apparent. That which is written changes not; and the law will not allow oral evidence to be introduced to contradict that which the parties have agreed to in writing. If, mean-

while, one of the parties has died, the written contract is yet more essential for proof. Hence, in business, one should never entrust to memory anything that can possibly be put into writing. (See § 39, 40.)

Notes:

1. In most disputes over contracts, the trouble arises because part or all of the contract is not written.
2. On this account the exchange of letters makes for certainty in contracts.

§ 38. Consideration

A promise to do something or to give something is not a contract, since a mere promise cannot be enforced by law. There must be a consideration for the promise; the consideration being something done, given, or promised by the other party.

One party's promise is a good consideration for the promise of another party. If A agrees to pay B for a certain service and B agrees to perform such service, a valid contract has been created and A must fulfil his promise when B has fulfilled his. Or if A promises to pay B for goods delivered to C, when B has made such delivery A must pay him.

Mutual Promises as Consideration. If a person makes a promise in return for another person's promise, the law will require him to make good his promise when the first party has fulfilled his. In other words, mutual promises are consideration for each other. An example may be found in an ordinary real estate contract wherein one party promises to sell and the other party promises to buy. The consideration for an enforceable contract may be very small compared with the value of what is agreed to by the other party; it may be inadequate or even insignificant.

For instance, a man might offer to give his son $1,000 if

he would refrain from smoking until he was twenty-one. It would seem that the son gives very little in return for the money, but he is giving up the right to smoke—and the contract will be enforced. In this case, the consideration for the $1,000 is the surrender of a privilege.

It is very common to mention the sum of $1 in contracts where the parties do not wish the real amount of the consideration to be known.

Inadequate Consideration. If the consideration agreed to by one of the parties is something impossible to perform, the contract is void and unenforceable. This would be true if one of the parties agreed to do an illegal act in return for the other party's promise. He could not be required to perform it; consequently he has given nothing.

Doing something that one is already obliged by law to do is not a valid consideration; for instance, a promise to pay a debt already owed would not be a good consideration for a new agreement.

Love and affection for one's friends and relatives do not constitute a legal consideration for a contract. One does not love them more or less on account of the agreement. There is no change in the situation of the person which would make it necessary for the law to interfere to compel the other party to keep his promise.

Notes:

1. Some consideration should always be mentioned in the contract.
2. It is wiser to name the true consideration, as then there can be no misunderstanding if it becomes necessary to prove the contract in court.

CHAPTER VII

HOW CONTRACTS ARE MADE

§ 39. Oral Contracts

A contract may be made simply by word of mouth or by words and acts. Such a contract is called an oral contract. If it becomes necessary to go into court in order to enforce it, it will be necessary to prove it by oral testimony. The parties to it will be called on to testify as to what was said and done, and if any other people were present either party may call them as witnesses.

In such a case the difficulty is that the agreement has not been reduced to writing and the various parties present probably have entirely different ideas as to the meaning of what they heard. The court may decide that the testimony as to what happened is so vague and contradictory that it cannot be enforced as a contract. The prudent business man will insist that all agreements be made in writing and properly signed, in order that there may be no question as to just what obligations he has assumed or what he may properly expect from the other party to the contract. Some contracts must be in writing or the courts will refuse to enforce them. (See § 41.)

Notes:

1. Avoid oral contracts.
2. Have all contracts written and signed by the parties thereto.

§ 40. Written Contracts

The written contract need not be a formal document. Two letters, one making a proposition and the other accepting

it, constitute a contract just as much as a legal document duly signed and sealed and acknowledged before a notary.

The written contract should contain all the terms—the names of the parties, a statement of the consideration with the time and the method in which it is to be paid or performed; a clear statement of just what is agreed upon, *when* it is to be done, and in what manner; together with any arrangements the parties wish to make if something happens to render the contract impossible of performance, or in case it is only to be performed under specified conditions.

Business men are accustomed to expressing themselves clearly, concisely, and explicitly in their letters. Letters and copies are always carefully filed and preserved. For this reason when legal assistance is dispensed with, a letter from the party making the offer and a reply from the party accepting or rejecting it are usually the most satisfactory method of securing a written contract. Each party has his own records. Since they are accustomed to expressing themselves by letter, they understand what they have agreed to better than if the terms were expressed in formal legal phraseology. Even if a lawyer is called in later, the exchange of letters is a good way of making an agreement. If there is an extended correspondence before the parties finally arrive at an agreement, the last letter should sum up all the terms on which they have finally agreed, and this should be answered by a simple letter of acceptance, repeating the terms as therein stated. (See Chapters LXXXI, LXXXII, Forms 2, 9.)

Notes:

1. Write all contracts. Never trust to an oral understanding.

§ 41. The Statute of Frauds

In order to do away with the uncertainty of relying on people's memories in contracts by word of mouth, a law was

passed in England in 1676, called the Statute of Frauds, which required certain contracts to be in writing. This statute has been copied in the law of most of the states of the Union.

The Statute of Frauds requires that the contract *shall be proved* by some memorandum in writing. It is not necessary to make the memorandum at the time the contract is agreed upon. If any memorandum or letter containing the essential terms of the contract, i.e., the names of the parties, the consideration, and enough to show the nature of the agreement, and signed by the party to be held, is written at any time before the other party comes into court to enforce the contract, the requirements of the law are satisfied.

Form of the Memorandum. The memorandum must be signed by the party against whom it is to be enforced, or he will not be liable under it. It need not be signed by the other party. Under the law as enacted in some states, this signature must be at the end; in others it is sufficient if it is put in any part of the memorandum with the intention of signing. This written memorandum need not be one paper; it may be written on two or three sheets if all refer to each other plainly and together make a complete memorandum of the terms of the contract. At an auction or a sheriff's sale, the auctioneer or the sheriff is the agent for both of the parties and may sign a memorandum for either of them.

Contracts Which Must Be in Writing. The following contracts must be proved by a written memorandum:

1. A contract where the consideration is marriage.

2. The promise of an executor or an administrator to pay a claim against an estate which is in his charge out of his own money. If any property of the estate is left, the claim will be payable out of that, but in any case the executor or the administrator will not be liable personally unless there is a written agreement.

3. A promise to be responsible for the debt, the default, or the miscarriage of another. This means a contract of suretyship or guaranty, which will be explained later. (See Part XIV, "Suretyship.")

4. A contract for the sale of land or of any interest in land. This does not refer to a deed, but to a contract to give a deed. A deed must always be in writing. A deed which is not in proper form to operate as a deed may sometimes operate as a contract to sell the property, and the party will be compelled to give a good deed. A defective deed cannot be corrected without much trouble.

If a person makes a contract to sell or to buy land through an agent, the agent must in most states be given authority in writing to sign the contract.

Growing things, such as trees, grass, and plants that come up of themselves every year are regarded as part of the land, and a contract to sell or to buy them must be in writing. Crops which have to be planted every year are not regarded as part of the land even while they are growing.

A lease of real property, if it is to last for over a year, must usually be in writing.

5. A contract which is not to be performed within a year from the time it was made. A contract which might possibly be performed in a year, although it might take longer, need not be in writing to be enforceable. It is always better, however, to have such a contract in writing.

6. A contract for the sale of personal property of over a certain fixed amount in value. (This is explained fully in Chapter XVII, "The Statute of Frauds.")

Notes:

1. The fact that an oral contract may be unenforceable because of the Statute of Frauds is another reason why all contracts should be in writing.

§ 42. Contracts Under Seal

The use of the seal is a survival from the time when very few people could read or write. The seal was used on the most important documents as we use a signature today. Because of the importance that was attached to it then, the seal is still used on documents of the greatest importance.

Deeds and mortgages of land, and in some states wills, must be under seal. A power of attorney to deed land also requires a seal. A seal on any document, such as a deed or a contract, is regarded as showing that there was consideration for the deed or the agreement whether any is mentioned in the document itself or not. In this country, however, a person is usually allowed to prove that there was no consideration, even if there is a seal.

A seal may in many states be merely a scroll. In others a little red wafer is used. In New York the letters L.S. (*locus sigilli,* the place of the seal) which were originally intended as instructions as to where the seal should be placed, are now regarded as a sufficient seal.

A corporation generally verifies papers, particularly important documents, with its corporate seal.

Notes:

1. Seals are generally required in connection with legal papers dealing with real estate, on bonds, and sometimes on wills.

§ 43. Implied Contracts

If one person accepts the benefit of another's services, the law holds that a contract to pay for them at what they are reasonably worth is implied, and the person who performs the service may claim compensation in court.

The same reasoning holds if a person occupies land, buildings, or rooms. The law implies a promise to pay a reasonable rent. If two people have a running account with each other,

the law considers that they have promised each other that the one from whom a balance is found to be due shall pay that balance to the other. The promise to pay is based on the fact that the party has willingly taken the benefit of what was done. If something was done for him without his making any request, and without his afterwards making any use of it, he could not be charged for it.

If, without orders, a man left bread at your door every morning, and you used it, the law would imply a promise on your part to pay for the bread. If he put a new roof on your house in your absence without orders, he could not collect for it, because you would have to use the new roof whether you desired such repair or not. In case the person who performed the service intended to do it without claiming payment for it, it would be a gift and there would be no implied contract to pay for it.

Notes:

1. It is always most satisfactory to have a distinct understanding as to prices for services rendered. Even lawyers, dentists, and plumbers sometimes have "kicks" coming about their valuation of their services.

CHAPTER VIII

EFFECT OF CONTRACTS

§ 44. Illegal Contracts

What constitutes an illegal contract has been explained in § 36. The point to make is that no contract which is against the law or against public policy can be enforced. If the parties come into court, both are equally chargeable with knowledge of the law and therefore with guilt in breaking it; and the court will refuse to help either or to interfere at all. If one of them has been defrauded out of his property by inability to enforce the contract, that constitutes his punishment for entering into such a contract. Such a party cannot get his property back nor can he enforce the contract.

There is a legal maxim to the effect that "ignorance of the law excuses no one." This seems harsh, but it is rigidly enforced. Therefore, if there is any doubt about the legality of a contract, the parties should assure themselves that it is in accordance with the law. Ignorance or good intentions will not excuse a man if he makes an illegal contract. (See also fraudulent contracts, § 46.)

§ 45. Effect of Mistakes

There are two kinds of mistakes possible in making a contract:

1. A mistake as to whom one is dealing with, what the agreement is about, or what is to be done under the contract.
2. A mistake as to the quality or the value of the subject the contract deals with or its legal effect.

A mistake under the first heading will mean that there is no contract. A party cannot be forced to observe a contract with someone with whom he did not intend to contract. The parties must be considering the same thing and must be agreed as to what is to be done about it, or there is no meeting of their minds and no contract.

If, however, there was no mistake as to what the contract was about or what was to be done, the fact that either or both of the parties believed that the subject of the contract was more or less valuable than it actually was will not make any difference in enforcing it. An agreement has been made and they will be held to it even if it means loss to one of them.

Neither will it make any difference if either or both of the parties did not realize that he would be bound by the contract or did not know just what he was required to do under the law to carry out his agreement. Every man is supposed to know the law, and it is his own fault if he failed to find out about it in the first place.

If a person knows that the instrument he is signing is a contract, and fails to read it, he will be bound by it even though it is a contract to do something entirely different from what he intended. No one should ever sign contracts without reading them.

In case, however, through the fault of some clerk in writing the contract an error of some sort gets into the written document so that it misrepresents the actual agreement between the parties, the court will order it rewritten to express what they really agreed upon. That is, a clerical error will be corrected.

Notes:

1. The terms of a contract should be written down clearly and in simple language. Both parties should then read them over, and any questions that arise should be cleared up before signing. Much trouble

and litigation would be saved if this course were followed in all cases.

§ 46. Effect of Fraud

If there is any fraud in inducing a party to enter into a contract, he may refuse to perform his share of the agreement. If the contract is already carried out, he may recover his property or its value. If he wants to annul the contract, however, he must return anything he has received under it unless it has been used up or destroyed at the time he discovers the fraud. If he prefers, he may let the contract stand and claim damages for any loss he may have suffered.

What Constitutes Fraud. If any false representation is made by a person who knows it to be false or has no positive belief or adequate knowledge in regard to the matter, intending to induce action and to create a false impression in the other party's mind, or to prevent him from investigating to find out the truth about the transaction, it amounts to a fraud. Misstatements about unimportant matters, or mere expressions of opinion in recommending an article for sale, do not affect the contract. The buyer must be on his guard against overstatements of opinion by the seller as to the virtues of the article he is selling. Overstatements are to be expected everywhere.

When a party relies on the opinion of an expert, however, or when he seeks advice from a person in whom he has a right to repose confidence, such as a father, a guardian, or an attorney, it is a different matter. Then an expression of opinion without sound grounds would amount to fraud.

If the reading of a contract be dispensed with as the result of fraud, the injured party may refuse to live up to the terms of the contract, or he may claim damages for the injury sustained. This rule holds good also whenever the legal effect of the contract has been misrepresented or when a fraudulent value is placed on that which is being bought or sold.

The injured party must act promptly as soon as he discovers the fraud. By delay he may lose his rights, since he will be considered to be content with the terms of the contract.

Taking advantage of another person's mistake is fraud.

In Shelton v. Ellis, Shelton & Co. learned of a mistake in the rate sheet of the Western and Atlantic Railroad Company by which the fare from Atlanta, Ga., to Rogers, Ark., was quoted as $21.25 when it should have been $36.70. They induced Garland, a traveling salesman, to buy a large number of tickets for them before the railroad company discovered the mistake. The court held that the tickets must be returned.[1]

If any part of the representations which induced the other party to enter into the contract was fraudulent and had any effect in inducing him to agree to it, the fact that most of the representations were honest will not make the contract good. But if the fraudulent representations referred to matters of no consequence and were not material to the contract they will not affect it. Also, if the other party relied on his own judgment in the matter, rather than upon what was told him, the fraudulent misrepresentations will make no difference.

What Fraud Will Nullify a Contract. Fraud in any of the negotiations leading up to a contract will nullify it. If fraud has prevented the party from making an independent investigation, or if it has led him astray in regard to the facts, it will make the contract void. Fraud not connected with the immediate contract but with previous negotiations will not affect the present contract.

Specious Schemes. Ordinary people of the salaried and the professional classes lose money running up into millions of dollars by investing in all sorts of specious get-rich-quick schemes. If they would study the prospectuses of these schemers, they would see how carefully they are written so as to avoid any positive misstatements but to give a strong im-

[1] 70 Ga. 297.

pression by a series of carefully worded opinions, estimates, etc. Such phrases as, "it is estimated," "it is expected," "there is every reason to believe," "it is the opinion of old miners," are used again and again. It is astonishing how plausible a prospectus can be made without giving any positive statement, except as to comparatively immaterial matters. The important matters in deciding upon an investment are: (1) the character and the experience of the management, (2) the amount of capital they will have to work with, and (3) the subject matter of the business. On these essential points there is rarely any positive information in prospectuses of this sort.

Notes:

1. Consult your own lawyer or banker before investing money.

§ 47. Duress

A party must consent to a contract of his own free will. That is the essential element of an agreement. Consequently, if his will is overpowered by that of someone else, the result cannot be a contract that will hold him.

There are two ways in which a person may induce another party to make a contract against his own free will. One is by the use of intimidation or force, the other is by taking advantage of mental weakness or of affection to influence him.

If a party signs a contract in order to escape from imprisonment or detention of some kind, he has signed under duress and not of his own free will and the contract cannot be enforced. If he signs it in fear of immediate bodily harm, which he has every reason to believe the other party is capable of inflicting, the same holds true. In a case where there is no detention but merely threats, the threats must be either of bodily harm or of imprisonment to the person himself or to some member of his family, or of an injury to his property, and must have been made under such circumstances that a man

could reasonably believe that there was immediate danger of their being carried out.

As soon as a party escapes from duress or from fear of the threats that coerced him, he may rescind his contract and recover any property or other consideration, or value therefor, that was taken from him under the contract.

§ 48. Undue Influence

Undue influence is when one party takes advantage of another through near relationship, such as that of attorney and client, doctor and patient, guardian and ward, etc.; or when the second party is mentally weak and at the mercy of his more keen-witted fellow men. A deficient person can hardly be said to exercise his own free will; contracts can readily be imposed upon him by others, and when this imposition can be proved, contracts made with him have no legal standing.

When a person takes advantage of mental weakness, or of near relationship, or of confidence reposed in him to influence another person to make a contract, it is not the free action of the second party and is no contract. People who are merely friends are not considered to be in such a position that the one can exercise an undue influence over the other. Where the consideration for a contract is plainly inadequate, it may raise a suspicion of undue influence.

If the person recovers his mental health, or is separated from the party who influenced him, he may refuse to carry out his contract and recover anything he has turned over to the other party under it.

His friends and relatives may also act for him in order to protect his property while he is still under the influence of the other party, or too incapacitated mentally to act for himself.

Notes:

1. No contract is of any value unless it is made by the free and unbiased will of both parties.

§ 49. Law as to Alteration

Any alteration in a written contract by one of the parties without the consent of the other, makes the contract of no effect as against the other.

The parties to a contract may alter it if they can agree on the changes to be made. If it is a written contract, one of the parties may make the alterations in the contract itself with the consent of all the other parties, or the parties may make a new written contract. If parties attempt to modify a written contract by an oral agreement there must be a new consideration for it distinct from that of the original contract, so that in effect a new and oral contract has been made.

A New Agreement. If the same parties make a new agreement about the same subject which is entirely inconsistent with the old agreement, the old agreement will be regarded as set aside by the new. If, however, there is any part of it which is not inconsistent with the new, that part still remains enforceable. (See also § 54.)

If one of the parties to a contract makes alterations in it without the consent of the other parties to it, this amounts to fraud, and the contract becomes unenforceable by the guilty party. If a person, not a party to the contract, and not acting for any of the parties to it, should make alterations in it, they would be treated as though they did not exist. The nature of the original contract could be proved by the testimony of the parties, and the contract would be enforced as it stood before the alterations were made.

Filling in a Contract. If the contract is not complete, however, but blank spaces have been left for any of the terms to be filled in later, any party to it to whom it is entrusted may fill out the blank spaces in any way which would be consistent with the other terms of the contract and enforce it as he has made it. If he were given instructions for filling it out, he himself could not enforce any other contract than one that was

in accordance with the instructions, but he might fill it out contrary to the instructions and transfer it to another party, who, knowing nothing of the instructions, would be entitled to enforce it as he received it. This question arises more often in the case of negotiable instruments and will be spoken of under that heading. (See § 159.)

Notes:

1. The best way to change an existing contract is to make a new written agreement signed by all the parties.
2. A new contract may be made by letters if they point out clearly what the new agreement is.
3. It is not safe to leave any written instrument with unfilled blanks.

§ 50. Interpretation of Contracts

A contract should be so clear that its meaning may be easily understood. As a matter of fact, many contracts are far from clear and all sorts of disputes arise over their meaning. A contract is interpreted so as to carry out the intention of the parties as nearly as may be. The court will try to interpret a contract in such manner as to make it lawful and enforceable. In this matter law and common sense coincide.

In getting at the intention of the parties where the contract is not clear, anything which is unessential and tends to confuse the meaning will be disregarded. If there are two statements which absolutely conflict, the court will consider that the first gives the true meaning and will disregard the latter.

The parties may bring in evidence to show the meaning of any technical terms which were used, or to prove some well-recognized custom or usage of business which will explain the meaning of certain terms, or which may be considered part of the contract.

If a contract refers to any other papers or documents, these will be read in connection with it.

Rules to Ascertain Meaning of Contracts. There are certain general rules which the court will always follow to get at the meaning of a contract. One is that in a printed form which has been filled out, if the written and the printed words are inconsistent, the court will disregard the printed words and follow the written ones. If any words or phrases are inconsistent with the rest of the contract, and a clear intention can be gathered from the rest without them, the court will treat them as surplusage.

If a general term is used, such as an agreement to do the "mason work" on a building, and it is followed by the mention of any specific kinds of mason work, such as "stone and brick work," "plastering," etc., it is a contract to do only the special kinds of mason work mentioned and not *all* the mason work on the building. In order to make a general contract for all the mason work, this intention should be clearly stated.

If any of the terms of a contract were intentionally made ambiguous by one of the parties for the purpose of taking advantage of the other party, the court will interpret the doubtful terms in the way that will least favor the party at fault.

In trying to decide what the parties intended where the meaning is doubtful, the court will be influenced by the words and the acts of the parties at the time of making the agreement, or the manner in which they have carried it out since. Their manner of carrying out the conditions shows what they understood by the agreement.

Notes:

1. A contract should always be stated in the simplest and most intelligible language possible, and the parties should go over it carefully to make sure that all of the terms are clear.

2. If it be desired to make it with reference to some particular business custom, it would be well to mention that custom so that there can be no doubt that both of the parties understood that it was to be part of the contract.

CHAPTER IX

ASSIGNMENT AND NOVATION

§ 51. Assignment of Contracts

A contract which calls for personal services cannot be assigned by either of the parties to it. No one can be compelled to work for a person unless he agrees to it; and no one can be compelled to have another working for him whom he did not choose, and these conditions would result if such contracts could be assigned.

A contract which depends on the skill, ability, or trustworthiness of one of the parties to it cannot be assigned by that party, but may be assigned by the other party. For example, a contract to write a poem cannot be assigned by the poet, but may be assigned by the publisher.

Any other contract may be assigned by either of the parties to it unless there is something said in the contract to forbid it. A party may assign a contract by simply handing the written contract over to the party to whom he assigns it, or by informing the other party to the contract by word of mouth that he has given up all his rights under it to the person to whom he wishes to assign it.

Form of Assignment. The proper way to assign a contract is in writing, usually on the back of the contract, if it is in writing, or if it is an oral contract, by a written assignment. In the case of contracts under the Statute of Frauds, the law requires the assignment to be in writing. No particular form of words is necessary if the intention to transfer all the rights in the contract is plain. (See Chapter LXXXI, Forms 6 and 7.)

Liabilities of the Assignee. A person to whom a contract is assigned by one of the parties becomes liable to perform all the duties of the party who assigns the contract. He receives only such rights as the original party enjoyed under the contract. If the contract was obtained by fraud, duress, or undue influence, or the other party to it was not competent to make a contract, such other party may refuse to perform it just as much as though the assignee were one of the original parties.

If the party who assigned the contract owed the other party anything which could have been offset against the contract, the other party may offset that amount against the person to whom the contract has been assigned.

Rights of Assignee. If a party should assign all his rights under a contract to one person and afterwards assign them to another, the second person would get no rights under the contract. If the party assigned only part of his rights to the first person, the second person might enforce such rights as remained. The second person would be entitled to sue for damages the party who claimed to assign the contract to him.

Subject to the rights of the other party, the person to whom a contract has been assigned may bring a suit to enforce it in all cases where the party who assigned it to him would be entitled to do so. In some states, if he sues in a court of law, he must bring his suit in the name of the person who assigned the contract to him. He may sue in a court of equity in his own name. In a case where there have been several assignments, the suit must be brought in the name of the party who gave the first assignment.

A person to whom a contract has been assigned should notify the other party to the contract at once that the contract has been assigned to him. If there has been an assignment to any other parties, the one who is the first to give this

notice will be entitled to have his rights enforced first. Then, too, it prevents the other party from paying out anything to the person who has assigned the contract. If he should pay it to him in ignorance of the assignment, the party to whom the contract has been assigned could not compel him to pay again to himself.

Notes:

1. All contracts which do not involve the personal element may be assigned unless prohibited by the law or by public policy.
2. Any form of assignment which cuts off all control of the assignor over the contract will be sufficient.
3. The assignee takes all the rights which the original party had in the contract, and the contract is subject to all the defenses which have arisen prior to its assignment.
4. The assignee should always give the other party prompt notice that the contract has been assigned to him.

§ 52. Novation

Novation is the substitution of other parties, or another party, for one of the original parties to the contract.

Where John Smith has an agreement with Henry Jones to buy a horse for a certain sum, and instead of paying for it, tells Samuel Brown, who owes him money, to pay the money to Henry Jones, and Henry Jones agrees to take Samuel Brown as his debtor for the amount, this is a novation. Samuel Brown has been substituted for John Smith in the contract, which can now be enforced against him, Samuel Brown.

Agreement of Parties. In order to constitute a good novation, all the parties must agree to the arrangement. Henry Jones must discharge John Smith from his agreement

to pay for the horse, and take Samuel Brown's agreement in place of it; John Smith must agree to discharge Samuel Brown from his debt to him in consideration of his payment to Henry Jones for the horse. If any of these considerations are lacking, the novation will not be enforceable. The discharge of Samuel Brown's indebtedness to John Smith is the consideration for his promise to pay Henry Jones; and his agreement to pay for the horse is the consideration for Henry Jones's acceptance of him as a substitute for John Smith.

In Ford v. Adams,[1] Jacob Schyer owed Ford some money. He gave a written order to Adams, who owed him, Schyer, to deliver 40 cords of wood to Ford. Ford accepted the substitution. Adams did not deliver the wood, and Ford sued him for it. The court said that there was not a good novation, because it was not shown that Schyer had released Adam's debt to him, and without that there would be no consideration to Adams for his promise.

Notes:

1. To constitute a good novation, the other party to the contract must accept the substitution and release the party making it from his obligation to him.
2. The party making the novation on his part must release the new party from all his claims.
3. All of the parties must accept the new arrangement.

[1] 2 Barb. (N. Y.) 349.

CHAPTER X

DISCHARGE OF CONTRACTS

§ 53. Discharge by Performance

The usual way to discharge a contract is by performance or fulfilment. This means performance by both of the parties. Performance by only one of the parties releases that party from liability on the contract, but does not discharge the contract or release the other party from his obligation.

Under the old common law rule, the performance must be strictly in accordance with the provisions of the contract. This has worked so much hardship and real injustice that equity has modified the doctrine, and allows a substantial performance with damages to compensate the other party for any loss he has sustained. This is specially true of building contracts, where even in an action at law substantial performance will be sufficient.

Substantial Performance in Building Contracts. If the variations in performance of an agreement were intentional, they would amount to breach of the contract. Where they were not intentional, the other party is entitled to deduct from the price the value of any such omissions as there may have been, and to have them repaired himself if he desires. This rule applies especially to building contracts.

In Heckman v. Pinkney, Heckman had a contract to do the carpenter work on a house that was being built for Pinkney. He failed to make cornices and to put centerpieces in some of the rooms according to the agreement; and the material for deadening the floors did not have hair in it, as had been stipulated. The court said that the variations were

not intentional or material, and that the contract had been substantially performed. [1]

Where time is of the essence of the contract, the performance must be within that time; a performance after the time set in the contract is not a performance. Although everything required under the contract is done, if it is done *after* that time it is not a performance.

Where the parties agree that the contract must be performed to the satisfaction of one of them, nothing which does not satisfy him will be performance. At the same time, he must be honest about his dissatisfaction and not pretend to be dissatisfied when he is not really so. Sometimes there is an agreement that the judgment of a third person shall be the test as to whether the contract is performed or not. In such case, the contracting parties must abide by his judgment, unless he is mistaken or fraud is shown.

Notes:

1. Performance must be substantially in accordance with the terms of the contract.
2. Where time is material to the contract, the performance must be within the time set.
3. Where the parties agree that the performance must be to the satisfaction of one of them, or to the satisfaction of a third party, the honest judgment of that party is the test of whether or not the contract has been performed.

§ 54. Discharge by Agreement

An agreement between the parties to rescind a contract, or a later agreement between the same parties with regard to the same subject matter, the provisions of which later agreement are inconsistent with the contract, will discharge the original contract.

[1] 81 N. Y. 211.

The agreement to rescind the contract must, like all other agreements, conform to all the rules governing contracts. The release of one party from his obligations is the consideration for the release of the other from his. But, where one party has performed his part of the contract, there must be some new consideration to him for releasing the other, or the agreement to rescind will not be enforceable.

There is only one case in which the parties may not agree to cancel a contract, and that is when it was made for the benefit of a third person and the third person has notified them that he accepts it. At any time before he accepts they may declare the contract void. For instance, a farmer might come into town and tell a storekeeper to send away and get a suit of overalls for his hired man and he would pay for them. He informs the hired man of what he has done and the hired man tells the storekeeper that he will call for the overalls when they are expected. At any time before the hired man told either the farmer or the storekeeper that he would take the overalls, they might have cancelled the contract, but not afterwards.

If two parties to an agreement make a new agreement about the same subject matter which is inconsistent with the old agreement in any way, the old agreement will be discharged to that extent. For instance, in an agreement of novation (see § 52), by accepting the substituted party, the other party discharges the party who substituted him from his obligations under the contract.

If the parties put an oral agreement into writing or instead of a written agreement make a new contract under seal, the old contract is discharged and they are bound only by the new agreement.

Notes:

1. The parties may agree together to rescind a contract, except that where it was made for the benefit

of a third party, they may not rescind it after he has given notice of acceptance.

2. A later agreement, between the same parties and with regard to the same subject matter, whose terms are wholly or partly inconsistent with a prior agreement, revokes that agreement so far as it is inconsistent with it.

3. An oral agreement is superseded and discharged by a later written agreement, and a contract in writing is superseded by a sealed instrument.

§ 55. Discharge by Various Other Causes

Operation of Law. A contract may be discharged by the operation of law. When a contract is discharged by the making of a new written or sealed contract, as has already been explained (§ 54), it is discharged by the operation of the law which declares that a written instrument is of greater value than an oral agreement, a sealed instrument than a written contract. When a person goes into bankruptcy, the law discharges all of his contracts with a few exceptions.

Impossibility of Performance. There are some cases in which impossibility of performance discharges a contract. If it were for some particular article which could not be replaced and the article were destroyed, or if it were a contract for personal services and the person became ill or died, the contract would be considered discharged, and there would be no liability for damages. The parties are considered to have realized that if such a thing were to happen the contract could not be performed, and to have made the contract on the understanding that it would be carried out only in case the article were in existence or the person were able to perform at the time. If the other party to a contract by his acts made performance impossible, it would discharge the other party from all obligation. (See Chapter XIII.)

Act of God. Where the performance becomes impossible by what is known as an "act of God," that is, a tornado, a hurricane, a flood, a tremendous conflagration, or some other accident or disaster amounting to a public calamity, the contract is discharged. Ordinarily a person takes the risk of the contract being impossible to perform if he does not make some provision for it in the agreement, and impossibility of performance is no excuse.

In the case mentioned in § 36, where the subject matter was destroyed at the time the contract was made, if one of the parties knew of it, he will be held liable for a breach of the contract, notwithstanding that it is impossible for him to perform it. In the case of a contract where one of the parties promises to do one of two things, if one of those things was impossible at the time the contract was made, he must perform the other.

In Case of War. When two countries go to war, all possibility of friendly relationship between them ceases. All contracts between their citizens on which nothing has yet been done are discharged. If anything has been done by either party under the contract, and it is possible to do so without injustice to either party, the contract will merely be suspended until the war is over, when it must be carried out fully in accordance with its terms.

Effect of Strikes. A contract may provide in itself that it is to be discharged on the happening of certain conditions. It is very common to provide against strikes, etc., in this way. The provision, however, must be in the body of the contract to be good. A notice at the top of the firm letterhead that all sales were to be subject to strikes or accidents would not form part of a contract afterward written on the letterhead.

Lapse of Time. Any contract is supposed to be performed within a reasonable time. Even if no time for performance be given in the contract, it will nevertheless be discharged if

a long period of time goes by without anything being done on it by either party.

Offer to Perform. If due performance is offered by one party and is not accepted by the other, the first party is discharged.

Notes:

Contracts may be discharged:

1. By the operation of conditions agreed to by the parties.
2. By merger or alteration of a written instrument, or by the discharge of the party in bankruptcy.
3. By lapse of time if delay is unreasonable.
4. By an offer to perform, if it was refused by the other party.
5. By impossibility of performance, where the impossibility is caused by the act of the other party; by operation of law, including a declaration of war; or by the destruction of the subject matter where the contract concerned a particular article or was for personal services; but not otherwise.
6. In making contracts to handle orders, to carry on construction work, etc., involving large amounts, where there is a possibility of strikes and various labor disputes preventing the finishing of the work at all, or at least within the time limited by the contract, parties should always provide against such delays. It is usually safe to have a fire clause, and to provide against destruction by floods, tornadoes, etc.

CHAPTER XI

ENFORCEMENT OF CONTRACTS

§ 56. Breach of Contract

> The obligation of a contract is an obligation created and determined by the will of the parties. Herein is the characteristic difference of contract from all other branches of law. The business of the law, therefore, is to give effect so far as possible to the intention of the parties, and all the rules of interpreting contracts go back to this fundamental principle and are controlled by it.[1]

A contract may be broken by either party in one of several ways, such as:

1. Failing to perform the contract.
2. Refusing to perform the contract.
3. Denying that there is such a contract.
4. Making it impossible for himself to perform the contract.

Failure to Perform. If a party breaks a contract by failing to perform it, the other party must have done all that can be required from him under the contract before he is entitled to bring suit. If his part of the contract was to pay *after* the other party had performed it, he need not pay until such performance.

If a party was to perform work or to deliver goods for which the other party was to pay, he must be able to show that he has either performed or offered to perform the work, or that he has delivered or offered to deliver the goods, before he has any right to claim damages. A party must remain

[1] Encyc. Brit., 11th Ed., Vol. VII, page 38.

ready and willing and in a position to perform what he agreed during the entire time of the contract; it is not enough once to have made the offer.

It is often hard to determine just when a contract has been broken by failure to perform. Unless the time within which it was to be performed was an important part of the value of the contract, the courts usually give parties what they consider a reasonable time in which to complete it, whether the contract sets a definite time for its completion or not.

A Reasonable Time. The difficulty is to know what the court will consider a reasonable time. The parties may, however, have this determined beforehand by stating in the contract that "time is of the essence (that it, an essential part) of this contract," in which case the court will enforce it within the time specified. Or, if this has not been done, the party for whom the services were to be performed or to whom the goods were to be delivered, etc., may demand that the other party fulfil his part of the contract within a certain time or he will consider it broken. If he has really given the other party a reasonable time, he will have a right to bring action if the services agreed upon have not been performed within that time.

A party is always allowed until the last minute of the time set to perform, and the day on which the contract was dated or the demand made will not be counted as a part of that time; for instance, if the contract was dated or the demand made on July 1, giving him 30 days in which to perform the contract, the time will not be considered to have expired until midnight of July 31.

Refusal to Perform. If a party refuses to perform the conditions of the contract when the time comes for performance, he also relieves the other party from further obligation and gives him an immediate right to sue for damages.

If a party refuses to carry out a contract before the time for its performance has arrived, in some states the other party has a right to regard this as final, but in the other states he must wait until the time for performance has passed before he is entitled to bring suit.

When a party notifies the other party that he does not intend to perform his part of the agreement and tells him to stop work on it, the latter, if he accepts the notice, should stop work immediately. He may, if he prefers, however, ignore the notice and treat the contract as still existing by continuing to perform his part, and in that case he is entitled to whatever is due at the end of the time for performance. If he does not accept the notice, he is bound to perform his part.

Denial of Contract. If a party denies that there is a contract, or makes it impossible for himself to perform it by disposing of its subject matter in some way, the other party is immediately relieved from all obligations and has the right to sue at once for the damages he has sustained.

Notes:

1. Refusal to perform a contract is a breach of the contract.
2. Making it impossible for one's self to perform a contract is a breach of the contract.
3. In either of the cases cited above, the other party may abandon the contract and sue at once for damages.
4. Failure to perform one part of a divisible contract is not a breach of the entire contract, and does not excuse the other party from performance of the rest.
5. In case of a breach by failure to perform, the other party must show that he has performed his part,

or was ready and willing to do so, before he can claim damages.

6. Where a contract has been partly performed by one party, the other party must carry out his part of it, unless the first party has refused to perform further, or the circumstances are such that he would not be able to perform the rest of it.
7. The party who broke the contract must be paid the reasonable worth of what he has done on it, unless his breach of it was wilful or the contract provided that he should have nothing unless he performed the whole.

§ 57. Remedies for Breach of Contract

The party who is injured by a broken contract may sue for damages, or he may abandon the contract and sue for the value of his services or of the goods furnished.

The moment a contract is actually broken the other party has a right of action for damages, but there must be an actual breach. People are inclined to rush into court when they think that their contract rights are disregarded, without stopping to make sure that there has actually been a breach.

Action for Breach of Contract. If an action for breach of contract is to be brought at all, it is best to do it as soon as possible after the contract has been broken, as the court may consider that a person has voluntarily surrendered his right if he waits too long, or possibly something may happen that will excuse the other party from performance. But there is one class of contracts in regard to which a great deal of care must be taken when bringing suit; these are contracts where there are several parts entirely separate from and having no connection with each other. If it is perfectly clear that they are separate, a party would have a right to sue for a breach of one of the parts at once without affecting his

rights under the rest of the contract. For instance, a breach of warranty in a contract would give a right to damages for that warranty without in any way affecting the rest of the contract.

Where one of the parties is prevented from performing a contract for personal services by sickness or death, he or his estate may recover the value of what he has already done; and where a contract has been partly performed by one of the parties and the other party has received any benefit from what has been done, he must pay for it unless the breach was wilful and intentional.

There are some exceptional cases in which an action for damages would not be an adequate remedy for the injured party, and in such a case a court of equity will compel the first party to perform the contract. (See § 61.)

In Marsh v. Blackman, Mrs. Marsh agreed with the two sons of Judge Blackman to take care of their father until his death for $2 a week. They later notified her that they refused to perform the contract. The court said that it would be impossible to compute the damages with any certainty as their amount would depend on the length of Judge Blackman's life, and that it would therefore compel the two sons to carry out their agreement. [2]

Instalment Contracts. But in contracts, for instance, which are to be performed by instalments, such as a contract to deliver 1,000 barrels of oil at the rate of 100 barrels a month until the contract is completed, it is not perfectly clear whether a failure to deliver one lot of 100 barrels would be a breach of the whole contract or not. The courts in the various states hold different views on this question. If a party brought an action for damages at once, he might find himself cut off from any further damages in case of the other

[2] 50 Barb. (N. Y.) 329. (This is an old case, before the high cost of living became noticeable.)

party's failing to deliver the rest of the oil; or if he treated the contract as broken he might find himself the one guilty of breaking it. The only safe thing to do in these cases is to consult a local lawyer.

A contract which is to be performed to the satisfaction of a party thereto or of a third person, such as an architect or an engineer, must meet with the party's satisfaction, but, as a general rule, the court will hold him to what it considers reasonable.

Breach by Failure to Perform. A breach by failure to perform does not usually take place until the time for performance has passed. However, in contracts where goods are to be paid for in instalments, or rent is to be paid by the month, if the contract is an entire and not a divisible contract, failure to deliver one instalment or to pay one month's rent will be a breach of the entire contract. Where the contract is a divisible one, failure as to a separable portion is a breach of that part of the contract, and the party may sue on that while the rest of the contract is being performed.

Breach by Refusal or Denial. Where the party positively refuses to perform, or denies the existence of the contract, an action may be brought at once for a breach of the contract. The other party does not need to do anything further on the contract himself, and, if he does do anything further, cannot recover anything for the extra work. There must be, however, a positive refusal to perform under any conditions.

Time to Bring Suit. The party has always a right to ignore an intermediate breach and to wait until the time for final performance arrives before bringing suit; but if he does this he takes the risk that some other happening may discharge the contract before that time. If, on the other hand, he waits until the time for performance, he is entitled to all the damages which he has sustained up to that time. In any case professional advice should be secured and followed.

It must be borne in mind that if the breach was of one provision of a divisible contract, the party must show that he performed whatever was due from him under that provision before he can claim damages for its violation.

Notes:

1. Where there is a contract for the delivery of goods or the performance of work by instalments, and there is a failure to perform one of the parts of the contract as agreed upon, a party ought to consult a lawyer as to his rights before making any statements to the other party about it.
2. It is always a matter for serious consideration whether a breach of contract justifies a remedy so costly and uncertain as a suit at law. (See Chapter IV, "Law and Equity.")

§ 58. Law Governing Remedy

It has already been explained (§ 36) that a contract is interpreted in reference to the law of the place where it was made, unless the parties state that they intend it to be governed by some other law; but if they specify some other law merely to evade the law of the place where the contract was made, the local law will govern despite their provision.

In bringing an action on a contract, the method of bringing it, the right to bring it, and the defenses that may be made to it, are all governed by the law of the place where it is brought, and defenses which may be made in some states cannot be used in others. The Statute of Limitations (§ 59) differs in the different states, so that a contract on which an action may not be brought in one state may be sued on in another if the party to be sued is subject to its jurisdiction.

Notes:

1. The place to bring suit is a matter regarding which it is necessary to seek legal advice.

§ 59. Statute of Limitations

The Statute of Limitations is the law that specifies the time limit within which an action may be brought. For the sake of peace and in order to put some limit to the time in which rights of property, etc., can be upset by lawsuits, laws have been enacted in every state providing that after a certain length of time specified in the law actions may not be brought in the courts. These laws apply to all the various forms of actions, including those on contracts. If the contract is under seal, the law usually gives a longer time in which to bring action on it.

Sometimes the Statute of Limitations provides that, after the time specified, the party shall have no further right of action. This means that the cause of action is dead altogether, and thus cannot be enforced anywhere. If the law of the state where the contract was made has such a statute, the contract cannot be sued on anywhere after that time has passed, because the statute is said to "go to the right of suit"; that is, it ceases to exist.

Usually, however, the Statute of Limitations merely "goes to the remedy"; that is, the cause of action remains, but the law does not allow the courts to enforce it after a certain time, and, if suit is brought after that time, the other party may plead that the law has barred the right to bring suit.

If, however, the other party does not plead the Statute of Limitations in such a case, the action may be brought, because it was passed only to protect him from the bringing of a suit at a time when he might not be able to get the evidence for his side, and if he is willing to fight the case on its merits he can do so.

Where the Statute of Limitations in the state where the contract was made affects only the remedy, it does not affect the contract; and the question as to whether the action may or may not be brought depends on the law of the state in

which it is desired to sue. Therefore, a contract on which an action could not be brought in the state where it was made might be sued on and enforced in some other state where a longer time was allowed by the Statute of Limitations for the bringing of the action, provided the other party lived there.

Notes:

1. It is right and just that if a party sleeps on his rights he should lose his cause of action, and that men should not have to fight stale claims.

CHAPTER XII

ACTIONS ON CONTRACTS—GENERAL RULES

§ 60. Introductory

Besides the particular provisions of the law of the state where the action is brought, there are certain general rules which apply to actions anywhere.

Assigned Contracts. Where a contract, or a cause of action arising out of a contract, has been assigned, the party to whom it has been assigned must bring the action in the name of the party to the contract from whom he received it, unless there is a law allowing him to sue in his own name. This is the rule of the common law, but now in most states the party who has the actual interest in the contract is allowed to sue in his own name.

Joint Contracts. Where there is a joint contract, all the parties to it must be brought into the action; that is, if other parties are jointly interested with the party suing, he must join them with himself as plaintiffs. If, however, they refuse to join as plaintiffs, the law in many cases provides that they may be joined as defendants, in which case the party so joining them must explain that they refused to be joined as plaintiffs and mention the statute by which he is allowed to join them as defendants.

If several parties are jointly obligated to the plaintiff by the same contract, when he sues he must include them all as defendants. If any of the parties to the contract are left out of the suit, they are released from all obligations under it, unless they agreed in the contract to be liable individually for the whole contract apart from all the others.

Assumption of Legality. The law always assumes that a contract is legal and proper; therefore the person who asserts that it was illegal, or the result of fraud, undue influence, duress, etc., must prove the fraud or other allegation.

Notes:

1. The law of the place where the contract is made governs its interpretation.
2. The law of the place where suit is brought governs the right to bring action on it, and the defenses which may be made.
3. Where the Statute of Limitations of the place where the contract was made takes away the right of action, no action may afterwards be brought on the contract in any state.
4. The assignee of a contract must sue in the name of the party to the contract from whom he received his interest, except where the law provides that he may sue in his own name.
5. In suing on a joint contract, all the parties must be joined, either as plaintiffs or as defendants.

§ 61. Specific Performance

There are some cases where damages do not repay the party for what he lost on the contract, as, for instance, if the contract was to buy some valuable work of art which he could not duplicate elsewhere. In contracts for the delivery of goods, where it is possible for the party to go out and to purchase other goods of the same nature, his loss can easily be computed and covered by damages; but where it is impossible to compute the damages, or where the property purchased is a work of art, an heirloom, or something else which cannot be duplicated or easily purchased elsewhere, so that damages do not compensate him for his loss, the court will compel the other party to perform the contract. This is

known as "specific performance," and is granted by what is termed a court of equity.

Land, with everything relating to it, is always regarded as having a peculiar value; so that a contract for the sale of land may always be specifically enforced.

In cases where the contract is for personal services, or cannot be carried out because the other party has disposed of the property involved, or for any other cause, the court will refuse to make a useless decree. In the case of personal services, it is not considered that any services which the other party might perform in order to escape imprisonment would be worth much. If, however, the other party has disposed of the property or otherwise put it out of his power to perform the contract *after* the suit in equity has been begun, the court of equity, contrary to its usual custom, will award damages.

Requirements of Courts of Equity. The party who brings a suit in equity must show that he has not been careless or negligent regarding his rights, but has insisted on them and promptly taken action to protect them. This carelessness and negligence are known in legal terms as "laches," and, unless there is some excuse for them, will prevent the delinquent party from recovering in a suit.

The party who brings such a suit must also be able to show that he has been in all respects just and fair himself, and he cannot ask the court to enforce any contract which is in the slightest degree unfair to the other party. He must show, too, that he has done everything in his power to fulfil the contract on his own part, and, if the other party has prevented him from performing it, he must show the court that he was and is able and willing to do all that was required on his part.

A court of equity will not enforce an illegal contract, or one that has been obtained by duress, fraud, or undue

influence. Nor will it enforce a contract that is unconscionable, or where an unfair advantage has been taken of another party's ignorance or inexperience. (See Chapter IV, "Law and Equity.")

Notes:

1. A court of equity does not enforce a contract which is illegal or improper.
2. Specific performance is granted only where damages would not compensate the party for his loss.
3. Courts of equity will see justice done as nearly as possible, and therefore, the party who seeks their aid must be prepared to do justice himself.

§ 62. Rules of Evidence

Certain rules have grown up with regard to the admission of evidence before a court. Some of these rules have been dictated by convenience, in order not to take up the time of the court unnecessarily; others for the sake of being fair to both parties. Some of the rules of evidence particularly concern contracts.

An oral contract must be shown by testimony. The testimony of the parties themselves, and of any witnesses who were present and heard the transaction, is competent; but anything in their conversation or relations which has no bearing on the contract will be excluded. It often happens that contracts are agreed upon between the two parties, and each remembers only the part that favors himself, and in such a case a court cannot give any relief, because the evidence balances. Where it is not possible to prove the making of the contract itself satisfactorily, evidence that the party in some way acknowledged or ratified it, or that he has partly performed it, may be introduced to show that there was such a contract.

The Burden of Proof. The burden of proving anything

is always on the party who asserts it; thus many cases fail, not because the party is in the wrong, but because he cannot prove his case. Judges and juries can act only on evidence brought before them, and if a case is good but there is no evidence to prove it, a court cannot give relief, and the law should not be blamed for it. This is why written contracts are so important. (See §§ 39, 40.)

The Parol Evidence Rule. The meaning of this rule is that other evidence will not be admitted to vary the terms of a written contract, because the contract itself is the best evidence of what its terms are. Oral evidence may always be introduced to support the contract. Necessarily, the performance of the contract, or a breach of it, will have to be shown by oral testimony. The same is true of abandonment of the contract; and anything which would show adequate motive may be introduced as tending to support the proof of the abandonment.

There are exceptions to the parol evidence rule. Where the contract is not clear in itself, it becomes necessary to resort to parol evidence to explain it. Any other paper or matter to which the contract refers may be proved in connection with it, and, if such paper shows on its face that the transaction outlined was not complete, the whole transaction may be proved. Oral evidence may always be introduced to show fraud, duress, undue influence, or illegality in the contract. The rules of evidence may even be stretched in such a case to allow the proof of other transactions not directly connected with the contract under consideration, tending to prove a fraudulent contract.

Admissions. A party will never be allowed to use his own statements and acts unconnected with the actual contract or the transactions leading up to it, to prove that there was a contract, or that what he claims as to its terms is true, but he, however, may prove anything which the other party said

against his own interest, and must also show any other statements made in connection with the admission which might have limited its effect.

Where a party employs an agent to deal for him, any admission against the employer's interest which the agent made at the time of, or during the transactions leading up to, the contract, may be used against the employer; but not admissions which the agent made *after* the execution of the contract.

Transactions With a Deceased Party. In order to protect estates against fraud, where a person is suing to enforce a contract against the executor or the administrator of a person who is dead, he will not be allowed to testify to any transactions which he had with the dead person, where there were no other witnesses present to testify as to what the dead person said or did. This is very important to remember, because, in the case of an oral contract where no witnesses were present, the party who is still living might not be able to prove the contract at all; and this is another reason why all contracts should be reduced to writing.

Notes:

1. The burden of proof is on the party who asserts anything.
2. Any evidence in order to be introduced must have some direct bearing on the contract itself, or on the transactions connected with its making and discharge.
3. Parol evidence cannot be introduced to vary the terms of a written contract except in case of fraud, duress, undue influence, or illegality; or where the contract is not complete in itself or its terms cannot be understood without reference to outside circumstances.

4. A party cannot use his own words and acts as evidence in his favor; but his admissions against his own interest may be used against him.
5. A party may not testify to his transactions with a deceased person where no other witnesses were present.

CHAPTER XIII

TENDER OF PAYMENT OR PERFORMANCE

§ 63. Definition

When a person is prevented by the other party to the contract from carrying out his part of it, he may make sure of his own rights under it by *tendering* (that is, *offering*) to pay or to perform. The offer must be made by the party himself, or by someone he has authorized, at the time the contract was due to be performed, and either at the place specified in the contract for goods, etc., to be delivered, or directly to the other party or any agent he has appointed to receive them. For instance, if the other party had ordered goods to be delivered to a railroad company, the goods might be offered to the railroad as an agent authorized to receive the goods. It is safer, however, to offer them to the party himself, as then no question can arise as to the validity of the tender.

Where there are bulky goods, the person desiring to make the tender may ask the other party to name a place where they are to be delivered, and, if he fails to do so, may notify him that the goods will be delivered to him at a certain time and place. Then delivery at that time and place will be good tender although the other party is not there to receive the goods.

§ 64. Time to Tender Performance

The tender must be made at the exact time specified in the contract, and before sunset on that day in order to give the other party a chance to examine the goods, etc. A tender before the time for performance has arrived does not meet

the requirements for a tender and will not save the rights of the party making it. If the contract specifies "on or about" a certain day, or "within" a certain time, a tender made a few days before the day set would be good. If a party cannot make the tender before sunset because the other party has remained away all day, he may make it as soon as the other party returns.

If a party positively states that he will not accept a tender under any circumstances, or has the party making it put off his premises or refuses to hear him, it is not necessary to make the offer. The party making the tender may show the court what happened, and will be excused. Unless it is absolutely certain that it will be impossible to make a tender, however, the party should at least try to make it. Only the absolute certainty that the attempt would be useless will excuse him.

§ 65. Extent and Kind of Tender

The exact amount of goods or money called for by the contract, including any interest due, and, if the other party has begun an action or suffered any damages, his expenses or the damages due, also must be offered. If it is money, the party should take care that it is in "legal tender." This really means, as a usual rule, that too much small change should not be offered. Five-cent pieces are a legal tender up to $5 and not over, while silver coins less than one dollar are a legal tender up to $10 and not over. United States treasury notes, gold coins, and silver dollars are a legal tender to any amount. Ordinary bank notes are not legal tender, but, unless objected to at the time, a tender in bank notes would be good.

If it is not possible to ascertain the exact amount, the party should take care to offer more than enough, as too little will not make a good tender.

If the contract called for services, the tender will consist of

notifying the other party that the party is ready and willing to perform the services at all times.

A tender must be made unconditionally. The party must simply offer what is due without calling for anything in return, not even a receipt or change, or it is not a good tender.

§ 66. Acceptance of Tender

If a party keeps property or money that has been left with him after he has had a sufficiently long time to examine and refuse it, it amounts to an acceptance of the tender. If he refuses to accept, the party making the tender may take the goods or money away, and inform the other party that he will hold them subject to his orders; he will then keep the goods or money separate from his own property and ready at all times for the other party if he calls for them. If the money is deposited in a bank, it must be put in a separate account and not drawn upon.

CHAPTER XIV

JOINT AND SEVERAL CONTRACTS

§ 67. Contracts Made by More Than Two Parties

Very frequently we find contracts to which there are more than two parties; and these may be of two kinds, namely, what is known as a *joint contract,* in which all the parties on one side agree to be liable together for what is promised in the contract, each one being bound for the whole; or a *several contract,* where each of the parties agrees to be separately liable for his part or for the whole contract. In some cases parties agree to be both jointly and separately liable, and then the person with whom the agreement was made has his choice of holding all of them liable together or each one liable separately.

Where the contract itself does not expressly state whether the parties are to be liable separately or all together for the whole contract, the court decides the nature of the contract from the probabilities of the case. For instance, the ordinary subscription agreement is a several, not a joint, contract, and no one would imagine that each party who signed expected to be held liable for the whole amount to be raised.

Where, instead of being an agreement by several parties to do something, the agreement was to do something for the benefit of several parties, the test as to whether it is a joint or a several contract is whether the agreement had to be performed for all of them together, or whether it could be performed for each one separately. If it was a contract made to a firm or a corporation, the corporation would be regarded as one person, but all the members of the firm would have to join in any suit on such a contract.

If, on the contrary, it was an agreement to perform services for several persons as individuals, it usually amounts to a separate agreement with each of the individuals, and each of them might bring suit to enforce the agreement with the first party without paying any attention to the other persons.

Where there is more than one person on either or on both sides of a contract, it should be stated in the contract whether their obligation is joint or several, or whether the obligation to them is jointly or severally. To do so will save much trouble in enforcing the contract, as, if a person brings suit on a joint contract against one person only, he releases all the rest of them from their obligations; while if it were a several contract he may bring suits against one after the other until he has managed to collect the entire amount due him.

Notes:

1. Where it was clearly not the intention of the parties to be liable for each other, the contract is several.
2. Where their interest is identical and in the whole contract, it is joint.
3. Where they intend to be both jointly and severally liable on the whole contract, the contract is joint and several.
4. A joint contract must be enforced by or against all of the parties to it.
5. A party to whom others are jointly and severally liable may sue all of them together, or he may sue one at a time.

Part III—Sales

CHAPTER XV

CONTRACTS TO SELL[1]

§ 68. Definitions

A sale is a completed transaction. The ownership of the goods has passed from the seller to the buyer, even though the seller may still hold the goods in his possession and the price may not yet have been paid. A contract to sell means that the ownership of the goods is to be transferred at some time in the future.

The definitions given in the Uniform Sales Act are as follows:

> A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration, called the price.
>
> A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration, called the price.

The distinction between a contract to sell and sale is this: in a contract to sell the goods are not delivered and title does not pass; while in a sale delivery is made or the title passes. The Statute of Frauds applies only to contracts to sell. (See § 86.)

§ 69. Uniform Sales Act

On account of the confusion of the law in regard to com-

[1] For forms of sales contracts, see Chapter LXXXII, Forms 8-15.

mercial transactions, commissions have been appointed by the various states to unite in working out uniform laws governing such transactions. Largely as a result of the activities of these commissions, two laws have been passed by many states: (1) The Uniform Negotiable Instruments Law has been adopted in 43 out of the 48 states of the Union. (2) The Uniform Sales Act has been adopted in the following states:

Arizona	New Jersey
Connecticut	New York
Illinois	Ohio
Maryland	Pennsylvania
Massachusetts	Rhode Island
Michigan	Wisconsin
Nevada	

and the Territory of Alaska.

The object of these acts is not to change, but to combine, the best features of the existing laws of the different states. There is, however, one change from general practice in the Uniform Sales Act—an attempt to make bills of lading negotiable instruments. The various states sometimes adopt these acts with slight modifications, but for all practical purposes the law is uniform.

§ 70. What Is Necessary to the Contract of Sale

A contract of sale (or contract to sell) must have the same elements as any other contract. In other words, there must be:

1. Parties who are competent to contract.
2. An agreement between those parties.
3. Consideration for the agreement.
4. The contract must be legal.

These elements have all been explained at length in the preceding chapters relating to contracts in general. (See Part

II.) A few peculiarities which concern sales alone will be taken up in the following sections.

Notes:

1. A sale is completed when the goods are transferred, but, if the buyer was not competent to make a contract, or the contract was illegal, the seller could not collect the price.

§ 71. The Agreement

This has been fully explained under contracts (§ 37). In the sale and in the contract to sell, there must be the proposal of terms on the one hand, and the acceptance of those terms on the other.

Notes:

1. To make a legal sale, there must be an agreement of the parties *which can be proved.*
2. A written contract signed by both parties is the best evidence of such an agreement.
3. A letter making an offer, which is accepted by another letter, is the simplest form of written contract.

§ 72. Sales to Persons Incompetent to Contract

The rules which have been laid down under the subject of contracts (§ 35) with regard to the contracts of certain persons who are by law made incompetent to contract or given only a qualified power to contract, apply also to the contract of sale.

The exception to the rules laid down, is an *actual sale* of (not a contract to sell) necessaries. A person who sells necessaries to a person who is not competent to make a contract may recover a *reasonable price* (not necessarily what he asked) for them. The Uniform Sales Act says that the goods must be necessary *at the time they are delivered.*

If a merchant furnishes necessaries to a married woman or an infant, he may charge them (1) to the woman or the infant, or (2) he may charge them to the father or the husband. He cannot charge them to both. He must make his choice and afterward bring suit against the party charged.

In this country necessaries include only food, clothing, and shelter of a grade suited to the means of the person to whom they are furnished; and in this connection it is well to bear in mind that such things as riding horses and automobiles are not necessaries.

Notes:

1. In supplying necessaries to a minor or married woman the merchant should inquire (1) whether the incompetent person is already provided; (2) whether he or she has any property from which a claim for necessaries could be collected. If the incompetent person is an infant or a married woman, the merchant may charge the amount to the father or the husband.

§ 73. The Consideration

A sale or a contract of sale which did not name a price might still be good, because the court which was asked to enforce it would assume that the goods were to be paid for at a reasonable price and charge the buyer accordingly. The price fixed may be dependent on outside circumstances that would affect it, as for instance the market price at the time of delivery.

The general question of consideration has been very fully discussed under contracts (§ 38).

Notes:

1. Parties in making a sale should agree on the price. Neither the seller nor the buyer may be satisfied with what the law will consider reasonable.

§ 74. Nature of Subject Matter

A person might make a contract to sell a crop which he had just planted, or grass which might grow in the future on land which he owned, or chickens to be hatched from eggs which his hens might lay; but if he had not the land or the hens, he could not make a contract to sell grass on land which he might buy in the future, or eggs from hens which he might later acquire.

Goods which are already in existence and in shape to be delivered may be contracted to be sold, and also:

1. Goods which still require some process to render them ready for delivery; i.e., cloth to be made by a tailor into a suit.
2. Goods to be acquired by the seller in the future; i.e., a commission merchant selling so many dozens of eggs which he has yet to buy from the producer.
3. Goods which may or may not be acquired by the seller in the future, depending on the happening of some condition; i.e., the same commission merchant selling so many dozens of eggs provided that he can obtain that number from the producers.
4. An undivided share in goods; i.e., a tenth part of a crop of wheat.
5. A definite number, weight, or measure of goods in mass; i.e., a quart of oats out of a barrel of oats.

Under the Uniform Sales Act, the goods mentioned in 1, 2, and 3 could not be the subject of a sale, but only of a contract to sell, since they are not yet in shape to deliver.

§ 75. Destruction of Subject Matter

When the goods which the seller is offering for sale have been entirely destroyed without his knowledge at the time the agreement is entered into, the contract of sale does not take effect. When they have been partly destroyed, the buyer may

refuse to take any of them, or he may take those which are left and pay the full price which was agreed upon. In the last case, if the price was divided up, as so much a quart, a barrel, etc., he may pay for what he gets. If there was one lump price named for the entire lot, he must pay the entire amount, because the court will not attempt to split it up for him. To do so would be to make a new contract for the parties.

If there has been an actual sale and the ownership of the goods has passed to the buyer, the loss falls on him if they are destroyed without fault of the seller, even though they remain in the seller's possession. If the ownership still remains with the seller, the loss would fall on the seller, wherever the goods may be, even though on their way to the purchaser.

Where the contract was not for any specific articles, but only for so many feet of lumber, bushels of wheat, etc., the destruction of the wheat or lumber which the seller had at the time the contract was made would not excuse him from performing it. He must go out and buy more to replace what was lost.

Notes:

1. The agreement of sale should be very definite as to the time when the ownership is to pass from the seller to the buyer. Much may depend on this fact.

§ 76. A Contract of Sale Must Be Legal

Every contract must be legal to be enforceable. A contract for the sale of liquor in a prohibition state could not be enforced, and, if liquor had been sold, the seller could not recover the purchase price. (See general discussion of illegal contracts, §§ 36, 44.)

Notes:

1. Where there has been an illegal contract, the courts will leave both parties just where they found them, and refuse to help either.

CHAPTER XVI

PASSING TITLE

§ 77. Delivery

In a sale—not a contract of sale (see § 68)—the delivery is made at the time, and there is no question in regard to the passing of title from seller to purchaser. The delivery may consist in merely setting aside the goods for the new owner, but the title passes, and, if the goods are afterwards destroyed, the loss is his. In one case the delivery consisted in giving to the purchaser the key to the building where some machinery was stored.[1]

A flood or an accident on a railroad which delayed the delivery of goods is not an excuse for the failure to perform a positive contract. It is a general rule that, where an engagement to do a certain thing is positive in its terms, an accident will not excuse performance. The Japanese look at this matter exactly the other way, and say that if conditions change after a contract has been made it would be unjust to compel performance.

In the case mentioned in heading 4 under § 74, where there is the sale of an undivided interest in goods, no actual delivery is necessary. By the sale, the purchaser acquires whatever the seller's rights were in the whole. If the seller had the right to have his share taken out of the mass, the buyer would have the same right; if the seller had a right to a proportionate share only in the price received when the goods were sold, the buyer would get only the same right. The time,

[1] Kellogg Newspaper Co. v. Peterson, 163 Ill. 158.

present or future, when the title will pass depends on the agreement.

In a contract to sell, the time for the title to pass depends on the contract; if the intention of the parties is clearly expressed, it passes at the time they have fixed upon. The rules given in the next section will determine when it passes in case the intention is not clearly expressed.

Notes:

1. Any act which the parties intend to represent delivery of the goods will be a sufficient delivery. If a grocer weighs out goods ordered and puts them on a separate shelf for the purchaser, they become at once the property of the purchaser.

§ 78. Rules for Delivery

The following are rules for determining the intentions of the parties as to the time at which the title passes, e.g., at which the buyer becomes the owner:

1. Where the goods are picked out and in the shape in which they are to be delivered at the time the contract is made, the buyer becomes the owner at that time.
2. When the goods have to be picked out, or something further remains to be done to them before they can be delivered, the buyer does not become the owner until that is done.
3. When a contract is made to sell a certain number, weight, or measure of goods, or goods to be acquired in the future by the seller, the buyer becomes the owner after goods answering the description in the contract are turned over to him, or he takes possession of them.
4. (a) When goods are delivered "on trial," or "on

approval," the buyer becomes the owner upon their delivery. He may, however, cease to be the owner and make the seller again their owner by returning them or notifying the seller within the time specified in the contract, or a reasonable time if none was specified, that he will not accept them.

(b) When the buyer lets the time fixed for the return of the goods pass without returning them, or keeps them beyond what is a reasonable time under the circumstances, or signifies his approval and his intention to keep them either by words or acts, he becomes their permanent owner.

5. If the agreement requires delivery to the buyer at a particular place, or payment of freight to the buyer or to a particular place, the property does not pass until the goods have reached the buyer or the place agreed upon.

Notes:

1. A contract to sell should specify precisely when title to the goods is to pass.

§ 79. Sales Without Delivery

Whether or not there has been a legal delivery such as described in § 77, it is always a risk to leave property in the seller's possession. The very fact that it is in his possession is apt to mislead innocent third parties who have no notice of the sale. If the seller was dishonest enough to sell the property again, there would be no chance of recovering it from any third party to whom he sold or pledged it. This is the case in California, Colorado, Connecticut, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Missouri, Montana, Nevada, Oklahoma, Pennsylvania, South Dakota, Utah, Vermont, and Washington. The laws in the above states regard leaving the property with the seller as opportunity for

fraud on other persons; hence, the party who so left the property must lose if the goods are sold to an innocent buyer. This is just, as, if a man has property in his possession, it is fair to assume that it is his, and if he sells it again the new buyer should be protected.

In most of the states, the court will *presume* that leaving the property with the seller amounts to a fraud, but the buyer may prove that the sale was a real one, made in good faith, and not a mere sham for the purpose of cheating anyone, and in this way may recover his property.

In those states where the Uniform Sales Act has been adopted, the law makes a seller who has the goods left in his possession the agent of the buyer to sell, pledge, or otherwise dispose of them. If it can be shown that there was no real sale, but only a pretended one, a creditor of the seller may treat the goods left with the seller as belonging to him and levy on them in payment of his claim.

Where for any reason possession is to be left with the seller, the only safe method for the buyer is to take a formal bill of sale and to file it on record in the proper office of registry for the locality.

Notes:

1. If a sale is made the seller should not keep the goods.
2. If the seller is allowed to keep the goods and sells them to an innocent buyer, the first buyer loses.

§ 80. Conditional Sales

It is possible for the seller to give the purchaser possession of the article that has been sold, and still to retain the ownership himself until the full price or a certain amount of the price has been paid. This can be done only by agreement, however, and where sales are made on the instalment plan it is very common to provide in the agreement of sale that the ownership shall not pass from the seller to the buyer until the

last instalment has been paid. Such sales are known as "conditional sales."

The law always enforces such an arrangement as between the buyer and the seller. For the sake of ready proof and avoidance of misunderstandings, the contract should be in writing. The usual plan is for part payments to be made as rent, with a proviso that the title passes to the purchaser when the last instalment is paid.

The difficulty arises from the fact that, as the buyer has the property in his possession, third persons are apt to be misled into believing that he owns it and has the right to dispose of it. Most of the states get around the difficulty by providing that the seller must file the contract in an office of public record. Everybody is then required to know that it exists, as in the case of a mortgage. If the seller does not put the contract on record, and the buyer is dishonest enough to dispose of the property to a third person who had no knowledge of the seller's rights, the seller loses the property. (See Chapter LXXXII, Form 10.)

§ 81. State Laws on Conditional Sales

In the following states conditional sales are good against third parties without acknowledgment or filing in any public office:

Arkansas
California
Delaware
District of Columbia
Idaho
Indiana
Louisiana
Massachusetts
Nevada
Oregon
Rhode Island
Tennessee
Utah

Those states which demand a record require different formalities in order to permit the contract to be put on record.

In the following the contract recorded is merely signed by the purchaser:

Alabama	Montana
Arizona	New York
Kansas	Texas
Maine	Vermont
Minnesota	West Virginia

In some of these more is required if the contract is for the sale of railroad equipment.

§ 82. Requirement of Affidavits to Conditional Sales Contracts

Some states require in addition an affidavit by the seller stating the facts of the sale. These are Nebraska, Ohio, and Wyoming. In others, if the contract is signed by a witness, the witness may prove it, and it is then admitted to record; but in most of the states the contract must be acknowledged by the buyer. In Iowa it may be acknowledged by the seller and is then entitled to be admitted to record. In the District of Columbia, only contracts for conditional sales of goods to an amount of over $100 have to be recorded.

§ 83. Rights in Illinois and Pennsylvania

In Illinois and Pennsylvania the rights of the seller under a conditional sale will not hold against a third party to whom the buyer may have sold the goods. In Illinois the seller may protect himself by taking a chattel mortgage on the article sold and recording that; in Pennsylvania he makes a contract to lease the property, the purchaser to pay a regular rental instead of instalments and to give back the property at the end of the rental period. Then a clause is added giving the purchaser the right to elect to keep the property instead of returning it at the expiration of the lease.

§ 84. Protection Against Lien on Property

Some states make selling property under a contract of conditional sale unlawful. In those states where a landlord has a lien on property in rented buildings, the contract should be recorded before the property is moved into the building in order to protect it against his lien.

If fixtures such as gas and electric chandeliers, etc., are sold under a contract of conditional sale, they will be protected by recording the contract and may be removed as readily as any other personal property. If, however, the property sold was something which went into the building itself and could not be removed without injury to it, such as a mantel or built-in china closets and book-shelves, the only remedy which the seller has is to claim a lien against the building for the amount due him.

§ 85. Protection Against Destruction of Property

Where the property is destroyed while it is held under a contract of conditional sale, the decisions are in conflict. In some states the buyer loses; in others, the seller; and in other states the matter has not been decided. Usually, under such circumstances, the buyer refuses to make further payments but may be held liable for the value of the goods. Unless the buyer can afford such a possible loss, it is prudent to provide for insurance.

Notes:

1. If a sale on condition is to be made, and the value of the article justifies it, a lawyer should be employed.
2. If articles are to be sold on instalments in different states, the laws of each must be considered and much care will be required in making the contract.[2]

[2] See "Conditional Sales," by Haring.

CHAPTER XVII

THE STATUTE OF FRAUDS

§ 86. Contracts to Sell

The definition in the Uniform Sales Act is as follows:

> A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

The distinction between a contract to sell and a sale is this: in a contract to sell the goods are not delivered and title does not pass; while in a sale delivery is made or the title passes. The Statute of Frauds applies to contracts to sell, not to sales.

§ 87. When the Contract of Sale Must Be in Writing

The Statute of Frauds discussed in § 41 applies to sales where delivery is to be made later and where the value is over a certain amount. This amount ranges from $30 in Arkansas, Maine, and Missouri; to $500 in Arizona, Massachusetts, New Jersey, Rhode Island; $2,500 in Ohio. $50 is usual.

The words "in value" apply where the Uniform Sales Act has been passed. In the old statute, the words were "in price."

The price is the amount fixed by the parties themselves; the value, what the goods are actually worth in the market. For this reason, contracts purely by word of mouth have become more risky under the Uniform Sales Act.

In order that a sale above the limited amount may be enforceable, a written memorandum of the terms of the agreement must be signed by the party against whom it is sought to enforce the contract, or his agent.

The written memorandum of sale required by the Statute of Frauds need not be formal. It may be a note, a letter, a telegram, a receipt, or may consist of several papers so connected as to make an intelligible sales contract. The written memorandum of sale need not be made at the time of the contract, but it must state all the material facts, the parties, the price, if a price was agreed upon, and specify the articles to be sold. It must be signed by the party, or by the agent of the party whom it is desired to hold. In states where the Uniform Sales Act does not prevail, the written memorandum of sale may have to be subscribed; that is, signed at the end of the contract.

Exceptions to the rule that a sale of goods above the limited amount must be in writing, are:

1. The buyer must have paid part of the price; or
2. The buyer must have accepted and actually received part of the goods.

The last two methods of satisfying the statute will be considered in the following sections.

Notes:

1. Any contract of sale above the specified minimum must be in writing.
2. All contracts should be in writing.

§ 88. Exception for Part Payment

A payment made at the time of entering into the contract of sale makes it enforceable, though it may be above the limited value. The payment may either be a part of the price, or something given or paid to "bind the bargain." This should, strictly speaking, be in addition to the purchase price. In England this earnest is no part of the price of the goods. Usually in this country it is part of the price. The amount is not material.

The thing delivered in part payment must be of some value, but if of any value at all, it will be sufficient to bind the bargain.[1]

Notes:

1. Part payment will bind the bargain, but it is no evidence as to time, terms, and essentials of the agreement, and it is a poor substitute for a written contract.

§ 89. Exception for Part Delivery

The second case mentioned in § 87 was: "The buyer must have accepted and actually received part of the goods." The word "received" means taken into actual physical possession, the word "accepted" means that the buyer must have determined in his own mind to become the owner of the goods. Both conditions must be fulfilled to make the contract enforceable. The buyer may show his consent to become the owner of the goods either by his words or by his conduct.

The "part of the goods" must be taken out of the actual amount of the goods to be delivered. Samples or specimens which do not come out of the buyer's share are not "part of the goods."

If the buyer has directed the goods to be delivered to a railroad company for transportation, a delivery to the railroad company is a delivery to him and their receipt for the goods will be his receipt. If he has not so directed, there is no receipt and acceptance until the buyer or his agent accepts the goods from the railroad company.

Notes:

1. Although he may have accepted the goods, the purchaser could still dispute the price, the warranties, and the other terms of the agreement. The

[1] Weir v. Hudnut, 115 Md. 525.

written contract is the only dependable means of proving the agreement.

§ 90. Exception for Amounts Below Specified Value

Contracts of sale below the minimum established by the law need not be in writing. If the transaction were below the value set in any particular state, suit could be brought on an oral contract; i.e., a contract not in writing. If it were proved, it could be enforced, but an oral contract is always hard to prove. (See § 39.)

If the contract of sale is above the minimum value, suit cannot be brought upon it unless it is in writing. If the parties to such a contract (not in writing) carry it out, it becomes an executed sale and stands, as does any other sale, but if either party refuses to carry it out, the other cannot enforce it at law.

A single contract for the sale of a number of articles, each of which is below the limited amount in value, must nevertheless be in writing if the value of all together is greater than that amount.

Notes:

1. It is safest to make all contracts in writing.
2. Any contract of sale above the specified minimum *must* be in writing. Any contract of sale below *should be* in writing.
3. It is never safe to enter into any contract without some memorandum in writing. Especially when there is anything indefinite about the possible value of the goods to be sold, the contract of sale ought to be in writing.

§ 91. Exception for Work or Services

If the article purchased involves work or services which make it suitable only for the original buyer, the contract

may be oral. For example, a man goes to a dentist and orders a set of false teeth. The dentist takes some porcelain and other materials worth very much less than $50 and out of them makes a set for which he charges considerably over $50. His work and skill are what give the teeth their value, and the teeth which are made for one man cannot be sold to another. In such a case the law says it is the dentist's services, not the materials, for which the man is paying, and the contract is not one of sale and need not be subject to any of the conditions mentioned in § 87. That is, the dentist can bring suit without a written contract.

If the article to be made is something which can be sold to someone else, the contract is one of sale and must satisfy the requirements of the Statute of Frauds.

The foregoing is a statement of the law where the Uniform Sales Act applies. There have been two other views of the case: one of them the English rule that if any article was to be made as a result of the work and services, the contract was one of sale; the other, the former New York rule that if there was any work to be performed on the article, the contract was not a sale but for work and services, and the Statute of Frauds did not apply to it. Either of these two rules may still apply in a state which has not adopted the Uniform Sales Act.

Notes:

1. Have a written contract in all cases where the price is more than you can afford to lose.

CHAPTER XVIII

WARRANTIES [1]

§ 92. Introductory

The definition of a warranty in the Standard Dictionary is:

> An assurance or undertaking by the seller of property, express or implied, that the property is or shall be as it is represented or promised to be as to quantity, quality or title.

If a farmer goes into an agricultural warehouse and asks to look at mowing machines, and after having inspected its stock and obtained prices to his satisfaction, says he will take the one which he has selected, he has assumed the responsibility for its fitness himself and has no recourse as to the seller for damages afterward if it should prove unsatisfactory. The court would apply the maxim *caveat emptor,* the ancient and harsh doctrine of the common law, signifying, "let the buyer beware." The common law took a sporting view of the dealings between buyer and seller, and did not wish to discourage skill in barter by stressing too much any ethical considerations.

At the present day, however, both law and trade morality have advanced a long way beyond this primitive conception of the rights of buyer and seller. Nearly all trade transactions are now based on certain contract conditions, expressed or implied, by which the risk to the buyer is largely eliminated. A change of property for a consideration rarely takes place

[1] For form of warranty contract, see Chapter LXXXII, Form 15.

without some conditions or warranties as to quality, utility, or other characteristics of the commodity sold.

Notes:

1. The buyer should take care that he has a warranty that what he purchases will serve his purpose.

§ 93. Conditions Precedent

An agreement that an article must be up to a certain standard is known as a condition precedent.

A condition precedent is a specification of the kind of article that is wanted with which the article must comply before there can be any sale at all.

If it is agreed that the article to be sold is to conform to a certain standard, there is no sale until an article is produced according to that standard. For instance, if the seller agreed to furnish a steam pump that would raise 100 gallons a minute to a height of 50 feet, he must furnish a pump that will do exactly this before the buyer is obliged to take it.

Notes:

1. Where there has been an agreement that the article to be sold shall be of a certain kind and quality, the buyer is not obliged to take any article that is not of that kind and quality.

§ 94. Express Warranties

An express warranty is a statement made by the seller about the quality, durability, working ability, etc., of the article sold in order to induce the buyer to purchase. The purchaser must have bought the goods in reliance on that statement. If he relies on his own judgment and selects the goods himself, there is no warranty even though the seller made a statement of fact.

Any statement of fact or any promise by the seller in regard to the quantity, quality, or title of a commodity is an express warranty, if the natural effect of such a statement is to induce the buyer to purchase the goods, and if the buyer does purchase the goods relying on such statements.

If there is a warranty, and upon using the goods it turns out to be untrue, the buyer may not return the goods, but he may sue the seller and recover damages in the amount of the difference between what the article is actually worth to him and what it would have been worth had the warranty been true.

The buyer must be on the lookout to distinguish between statements of fact and expressions of opinion. Many prospectuses are cleverly worded to give the impression of being statements of fact, while still permitting the companies floating them to escape legal liability. Any such phrase as "it is estimated," "it appears," "there seems to be," "experts estimate," etc., or any phrase which qualifies the simple statement of fact, makes the assertion a mere worthless expression of opinion.

If a merchant tells you that his goods are the best on the market, this is not an express warranty, as it amounts merely to his opinion of them, and is what is called "merchant's puffing." If, on the other hand, he makes an express statement that these goods will wear better than certain similar goods manufactured by another firm, you may rely on his statement as an express warranty.

It is always well to get a warranty in the most definite terms possible, for if a merchant is really willing to warrant his goods he will not be afraid to say so in plain language if the buyer insists upon it. If the merchant is not willing to make a definite warranty, it is better for the buyer to know it beforehand and to realize that he is relying on his own judgment and can claim nothing from the merchant in case

the goods prove unsatisfactory. A written warranty prevents forgetfulness on the part of the seller.

Notes:

1. In all purchases, make sure that all terms are plainly written out, in positive language.
2. In all prospectuses, analyze the statements and note the positive assertions as to material matters.

§ 95. Implied Warranties

In every sale today there are certain implied warranties which the law compels the seller to make good. In regard to his right to sell the property, he warrants by the mere act of selling goods:

1. That he has a right to sell the goods, or, if it be a contract of sale, that he will have the right to sell them when the time for the sale arrives.
2. That the buyer shall not be disturbed by any claims made by others against the goods.
3. That the goods are free from any claim, charge, or incumbrance at the time of the sale.

These warranties do not apply to sheriff's sales and auction sales. There the buyer takes the risk that the article may be claimed by someone else.

If the seller sells stolen goods, the buyer will be forced to return the goods to their rightful owner, but he may, if he can, recover from the seller the damages which he has suffered because of the sale.

Special Situations. There is what seems to the public a curious situation here. If the seller had actually stolen the goods, the buyer would have to give them up to the rightful owner even though he knew nothing of the theft; whereas, if the seller had obtained the goods with the consent of the

rightful owner through fraud, the buyer, ignorant of the fraud, might be allowed to keep them. There is a case where a man bought some jewelry on credit by representing himself to be another man, and afterwards sold the jewelry to a third person who had no knowledge of the fraud, and the third person was allowed to keep the jewelry. This is because the jeweler gave up the property of his own accord to the fraudulent seller and therefore enabled the seller to lead the third person into buying the jewelry and paying out his money for it.

Other Implied Warranties. There are two other warranties which go with a sale of goods even though nothing is said about them.

1. If the buyer makes known to the seller the purpose for which he intends to use the goods, or if this purpose was known to the seller, there is a warranty that the goods are fit for the purpose.

Whenever a person goes into a market or a grocery store to buy food, the butcher or the grocer is supposed to know that he is buying it for the purpose of eating it and there is, therefore, a warranty that the food is fit to eat.

If the buyer orders goods by their trade names (Quaker Oats, Ivory Soap, etc.), the seller is relieved from any warranty that they are fit for his purpose.

2. If goods are bought from a person who regularly deals in that kind of goods, there is a warranty that they are of merchantable, that is, salable quality.

When a person orders goods from a description in a sales catalogue, or from a sample, there is also an implied warranty that they are similar to the description or sample.

The seller is liable in damages to the buyer if any of these warranties are broken. He is liable only to the *immediate* buyer, however, and not to other persons to whom the buyer sells the goods, although he may, if he manufactured

the article himself, be liable for any injuries suffered as the result of a defect in them.

Notes:

1. The fact that the law implies certain warranties should not prevent the buyer from obtaining positive written warranties on all important purchases.

CHAPTER XIX

REMEDIES

§ 96. Rights of Unpaid Seller Under the Contract

The various sorts of warranties protect the buyer in all business transactions. It is, of course, necessary for the rights of the seller to be protected. Most breaches of contract in cases of sale arise from the failure of the buyer to make the required payments. In such cases the goods may be in the possession of one of the following three parties:

1. The unpaid seller may still have the goods in his own possession; or
2. They may be in the possession of a railroad, a steamship, or an express company for the purpose of shipment to the buyer; or
3. They may be in the possession of the buyer himself.

A seller is still unpaid if he has been given a bad check or note in return for the goods.

1. If the seller has the goods in his own possession, and if they were not sold on credit, any of the following courses is possible:

(a) The seller may refuse to give them up until they are paid for.

(b) If the goods are of a perishable nature, or if the buyer has failed to pay for an unreasonable length of time, or if the seller has reserved that right in his agreement of sale, he may resell them to another person, keep the price, and sue the buyer for damages for any loss he may have sustained by the transaction.

(c) The seller may, if the time for payment has arrived, notify the buyer that he holds the goods for him and sue him for the price.

(d) The seller may, if the time for payment has arrived and no payment has been made, sue the buyer for damages for breach of the contract.

The measure of damages will be the difference between what the seller can sell the goods for to someone else and the contract price. If the seller was manufacturing the article, he may claim damages for whatever loss he has sustained in time or otherwise up to the time the buyer notified him that he refused to take the article, *not* for any loss through continuing the work after that. Of course, if he can sell the article when finished to someone else at the same price, there is no loss.

If the goods were sold on credit, and the term of credit has expired while they are still in the seller's possession, or if the buyer has become insolvent, then the seller may exercise either of the last two rights.

2. If the goods have been delivered to a railroad company, etc., for transportation, the seller's rights may be summed up as follows:

(a) If in giving the goods to the railroad company for transportation the seller reserves the right of ownership to himself, he may refuse to allow the goods to be delivered to the buyer until the latter pays the purchase price.

(b) If the buyer becomes insolvent and the goods are in transit, the seller may stop their delivery and enforce any of the remedies mentioned under (1), provided the railroad, express company, or other carrier, has not informed the buyer that they are holding the goods subject to his orders.

The seller cannot, of course, stop the delivery of the goods after they are in the possession of the buyer or his agent, even though it was before they reached their destination. If there has been a bill of lading issued for the goods, the railroad company may refuse to give them up until the bill of lading is returned.

3. If the goods have come into the possession of the buyer, they are his property and the seller has lost all claim to them. The seller can only bring suit for the price if it is not paid when due.

Notes:

1. A provision permitting the seller to resell the goods in event of non-payment before delivery should be inserted in the contract in those cases where the buyer's credit is not dependable. This allows him to protect himself by selling them without running the risk of being held guilty of breaking the contract.

§ 97. Rights of Buyer

Where the seller refuses to give up the goods to the buyer, except where the buyer does not pay at the proper time (see § 96):

1. The buyer may have the right to the ownership of the goods. In this case he may sue the seller for damages for withholding the goods.
2. Or the buyer may have no right of ownership over the goods, but only a right under the contract to have the goods delivered to him. In this case:
   (a) The buyer may sue the seller for damages for breach of the contract; or

(b) If the article was of a special kind or made to order so that he could not get it anywhere else, the buyer may go into a court of equity and sue to compel the seller to perform his contract.

The measure of damages in any of these cases is the difference between what the buyer could go out into the market and buy the goods for, and the contract price. If he could get them for the same price or less in the market, he would, of course, have suffered no damages.

Where the seller delivers the goods but they fail to come up to a warranty which he has made for them:

1. The buyer may keep the goods, and either
   (a) Deduct an amount from the purchase price to cover the breach of warranty; or
   (b) Sue the seller for breach of the contract of warranty.
2. Refuse to accept the goods, and either
   (a) Return them and demand back the purchase price; or
   (b) Return them and sue the seller for damages for breach of the contract of warranty.

The buyer must return the goods in as good condition as they were when received, unless the damage has resulted because of the fact that they were not as warranted. He cannot return them if he once accepted them knowing that they were not as warranted, or if he fails to notify the seller within a reasonable time that he refuses to take them.

If the goods are really not as warranted, and notice has been given to the seller that the buyer refuses to take the goods, the buyer cannot be held liable for the price. If he has paid any part of the sum due, he is entitled to have that money back before returning the goods, and, if necessary, may

sell the goods to another party in order to get back what he has paid on them, handing over the surplus to the seller.

The measure of damages which the buyer may recover for a breach of the contract of warranty is the difference between what the goods were actually worth at the time they were delivered, and what they would have been worth if they had been as warranted.

Notes:

1. In any case where the buyer intends to assert his rights, he should act promptly. Delay may be fatal. A buyer should never accept goods without examining them. Where there was a warranty of durability, he should notify the seller of his dissatisfaction, or refusal to accept the goods, just as soon as he discovers that they are not up to the warranty. It is a prudent thing in such a case to provide in the agreement of sale that the buyer may keep back part of the purchase price till he has tested the article warranted.

§ 98. Rescission of Sale

The buyer and the seller may agree together to cancel the sale. When the seller has the goods in his possession or has stopped them on the way to the buyer, he may call off the sale if he has reserved that right in the contract and the buyer does not carry out his agreement; or if the buyer fails to pay for the goods within a reasonable length of time. The buyer may call off the contract if the goods are not as warranted.

When the sale is called off, the buyer must return the goods to the seller, and the seller must return the price to the buyer. But the buyer may keep the goods until the seller pays him back what he has paid, and the seller may keep the price until the buyer returns the goods. Either party could

take the initiative. The one who most desired to cancel the sale would probably move first.

When goods are not up to the warranty the buyer must return the goods in the same condition in which they were, unless they were damaged when he received them. He may either actually return them or notify the seller that he refuses to accept them and will hold them subject to his order.

Notes:

1. Either party who wants to call off the sale should do so just as soon as he finds out that he has been cheated. The court will not look with favor on any delay, as it is not fair to the other party. The buyer may sell the goods if necessary and get out of the money realized what he has paid on them. If he has paid the entire price and the goods do not realize that amount when sold, he may sue the seller for what he has lost on the transaction.

CHAPTER XX

SALES AT AUCTION

§ 99. Regulations for Sales at Auction

A sale at auction is held in accordance with terms printed in the auction bills. The sale is made when the auctioneer lets his hammer fall. He need not accept any bid unless required to do so by the terms of the printed auction advertisement. Generally such an advertisement will specify that the property is to be sold to the highest bidder. An auctioneer may refuse to recognize bids that are not substantially higher than the last bid, the amount depending on the value of the article offered for sale.

If the seller had printed in the auction bill a provision that he reserved the right to take part in the bidding, himself, he might bid at the sale or have his friends do so for him. Otherwise if the seller, himself, bids, or has bids made for him, the person to whom the goods are finally knocked down may refuse to take them if he discovers the situation.

§ 100. Compliance with Conditions

The sale may be made on some condition. The buyer must then comply with the condition before he can receive the goods. Sometimes bidders are required to make a deposit before being allowed to bid; sometimes they are required to make a deposit after the bid is accepted. If the bidder does not comply with the terms of the sale he forfeits this deposit, unless it proves that the seller could not give him good title to the property, in which case he may recover his deposit and refuse to take the goods.

A purchaser at an auction sale must always pay cash before he is entitled to the property.

The seller may sue the purchaser for damages if the purchaser fails to take property which was knocked down to him. The seller may also sell the goods to someone else for what he can get for them. This amount will be deducted from his damages.

§ 101. Duties of Auctioneer

The auctioneer acts as an agent for the seller in selling the property; for the buyer in signing a memorandum of the sale. The seller will be bound to carry out the sale which the auctioneer makes, and the buyer to take the goods according to the memorandum of sale. An auctioneer is not allowed to bid for himself at a sale, but he may make bids for someone else. If he does not state for whom he is selling the property, he is personally responsible to the purchaser for seeing that the terms of the sale are carried out.

An auctioneer who sells property that does not belong to the seller is personally responsible to the owner of the property, even though he honestly thought it was part of the goods to be sold. Because of all this responsibility, the law usually requires an auctioneer to have a license. In New York a man must take out a license to act as auctioneer in order to sell even his own property.

The auctioneer has a lien on the property for his commission, and may require the commission to be paid him before giving up the property to the purchaser.

Notes:

1. In planning for an auction sale, all the terms should be decided upon and printed in the handbills advertising it. If the owner of the property wants to reserve the right to bid or to have bids made for him, it must be definitely stated.

Part IV—Agency

CHAPTER XXI

PRINCIPLES OF AGENCY

§ 102. Introductory

In the complex commercial life of today much of the world's business is of necessity transacted by proxy. The amount of business that one man can do is limited. Hence, to conduct the great activities of the world, those with executive ability empower others to act for them. At the present time the larger proportion of business men are not doing business for themselves, but are acting as agents for others. On this account the subject of agency is of primary importance. Many men are principals, yet more are agents; and all have to do with agents and should know what agents' powers are and just how far they represent their principals. The matter of agency enters into all departments of business and will come up again and again in the treatment of other subjects in this work. The subject of agency is of vital importance in insurance, partnership, and corporation law.

§ 103. Definitions

An agent is one who represents, or is authorized to represent, another person in a business transaction or transactions with third parties.

The person represented is known as the principal.

The person appointed may be known as agent, factor, broker, attorney, proxy, delegate, or representative.

The relation between the principal and the agent is termed agency.

§ 104. The Principal

Anyone capable of transacting his own business may appoint an agent to act for him in the same matters. A standard text-book expresses it thus:

> It may be stated as the general rule, by the common law every person who is competent to act in his own right, and in his own behalf, may act as an agent.[1]

In the California Code it is expressed as follows:

> Any person having capacity to contract, may appoint an agent.

The legal doctrine of agency is based on the principle that whatever a person may do for himself, he may do by another person. The person who appoints an agent must be, therefore, capable of transacting his own business; that is, when he appoints an agent, he must be sane, sober, and capable of acting for himself, and also, he must be of full age—hence a minor cannot appoint an agent.

The following are legally qualified to be principals:

1. Corporations may appoint agents to accomplish their corporate purposes—in fact, a corporation can act only by its agents.
2. Partnerships may appoint agents, and apart from this each partner is held to be an agent for the firm.
3. Married women may appoint agents.
4. Unincorporated clubs and societies may appoint agents.

Notes:

1. The principal must be competent to act, and in his sane mind.

[1] Mechem on Agency, 129; Cyc. 31, p. 1175.

2. Infants are not competent to act for themselves, and hence cannot appoint agents.
3. Partnerships, clubs, and societies may be principals.
4. Corporations can operate only through agents.

§ 105. The Agent

Any person who is qualified to perform the act in question may do it as the agent of another.

> Anyone who has capacity to act for himself is ordinarily capable of acting as agent for another . . . . it is generally thought he may be capable of acting as agent for another, although he is not capable of acting for himself.[2]

The particular point to be noted in this statement is that a person may be legally incompetent to act for himself, but yet may lawfully act as agent for someone else. For instance, a minor, i.e., anyone under age, cannot contract for himself, but he may act as agent for an older person and what he does will bind the older person. [3]

A child may be the agent of his parent. But it must be because the child has been appointed an agent, not simply because he is the child of, or is living in the house with, the parents. In such cases, to be an agent, the child must have been directly authorized by the parent to act along certain lines, or else it must be shown that the child had been in the habit of so acting with the approval of his father or mother.

In a New Hampshire case the judge said:

> A son has no authority, as such, to lend his father's property, and there is no presumption that such authority has been given the son.[4]

Notes:

1. A minor who cannot contract for himself may contract as an agent for someone else.

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[2] 31 Cyc. 1212; Lyon & Co. v. Kent, 45 Ala. 56.
[3] Sheldon v. Newton, 3 Ohio State 494.
[4] Johnson v. Stone, 40 N. H. 197.

2. Anyone can be an agent to do anything he is sufficiently intelligent to do.
3. A parent is not bound by the contract of a minor child unless he has expressly or impliedly made the child his agent.

§ 106. General Agents

A general agent is one authorized to assume entire charge of his principal's business, or of all of some kind of business, or all of his principal's business at some particular place.

Unless notified to the contrary, people dealing with an agent have the right to presume that his agency is a general one, and that he is authorized to do anything usually done in such a business. A general agent has unrestricted powers to deal along the line he is engaged in.

The manager of a business is a general agent with power to use his individual judgment and to act largely upon his own initiative. His employer controls and limits his general policy, but he does many specific acts at his own discretion, and delegates authority in minor details to subagents who answer to him for what they do.

For instance, the manager of a grocery store is a general agent for that purpose and has authority to purchase all kinds of goods that are sold in the store, and to contract for necessary repairs and improvements in the store. He has no authority to buy dry-goods, hardware, or other things outside his line of business. He has no authority to sell the whole store, or to buy real estate, or to build a new store. If such an agent wanted to contract for an addition to the existing store, the contractor would do well to find out whether or not the agent had authority to do this, because this would seem not to be included in his general authority.

An agent may possess direct authority to bind his principal in a particular transaction; that is to say, the principal may

expressly empower the agent to bind him; and this direct authority will carry with it, by implication of law, such powers as are suitable and reasonably necessary to accomplish the intended purpose.[5]

A superintendent of a factory is a general agent for the purpose of running the factory, and is presumed to have power and authority to do anything necessary to keep it in operation, and in case of emergency to preserve the business and the building and to protect the employees.

It is expedient to know, when you are dealing with an agent, whether he is a general agent or a special agent.

Notes:

1. A general agent has wide powers in his particular line of business.
2. He has no authority to bind his principal outside of his general line of business.
3. A third person having ascertained the general character and the scope of an agency may rely on the agent's having such powers as naturally and properly belong to his position.
4. In doubtful cases, it is safest for those dealing with a general agent to ascertain the extent of his authority.

§ 107. Special Agents

A special agent is one authorized to act in a specific transaction or in a limited line of business. The authority of a special agent is not so broad as the authority of a general agent.

A special agent is authorized to do some special thing. He may make, for instance, but the one contract or the one sale for which he has been appointed. Should he do some other special thing, which he honestly considers more to the

[5] Hackett v. Frank, 105 Mo. App. 384.

interest of his principal, he would depart from his instructions and he alone would be liable; the party represented would not be bound. For example, an agent authorized to sell a particular painting would have authority to sell *that* painting and to bind his principal in what he did in connection with the one transaction, but he would have no authority to do anything else.

Similarly, a special agent might be authorized to buy wheat for his principal; in that case he would have no right to buy lumber, coal, or another grain, but he could bind his principal in any transaction for the purchase of wheat. If the agent has an established office or place of business where he has been doing business for some time with a sign or signs indicating his agency and line of business, a third person would be safe in doing business with him in the particular line.

In dealing with a special agent engaged for a particular transaction, a third party should ask to see the agent's authorization, which is usually in writing.

In a New York case, a father authorized a son, James L. Palmer, to accept a draft for $2,000, drawn upon the father at not less than thirty days. The son accepted the draft for $482, payable ninety days after date, in the name of his father. The court held that he was a "special agent," and had no right to go outside of his authority.[6]

A written request to a real estate broker as special agent, to find a purchaser for real estate, does not confer upon him any authority to sign a binding contract of sale for his principal. To do this, he must also have authority to sell.

Notes:

1. A special agent has limited authority.
2. This authority may be indicated by:
   (a) Written authorization.

[6] Nixon v. Palmer, 8 N. Y. 398.

(b) An established office with signs and advertisements.

(c) A continued course of dealing.

3. No one can become the agent of another except by the will, expressed or implied, of the principal.

4. The agent cannot create in himself a particular authority merely by the performance of the act.

§ 108. Del Credere Agents

A *del credere* agent is one who guarantees his principal that his sales will be paid.

An agent employed to sell goods sometimes guarantees his principal against loss from any of the customers to whom he sells; in such case, the agent is termed a *del credere* agent. It is not a common arrangement, but nevertheless it is used occasionally in mercantile circles.

> A factor with a *del credere* commission or agency is one who in consideration of a higher compensation expressly agrees to pay his principal the price of the goods he sells himself, if the purchaser does not.[7]

A contract of a commission merchant with his principal whereby he, for a commission of 5 per cent, undertakes to sell goods and guarantees his sales, need not be in writing.[8]

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[7] 20 Cyc. 186.
[8] Sherwood v. Stone, 14 N. Y. 267.

CHAPTER XXII

THE CONTRACT OF AGENCY[1]

§ 109. Appointment

The appointment of an agent may be oral, written, or by usage. An agent can be legally appointed for most purposes by an oral or spoken contract. The objection to an oral contract is the difficulty of proving it, and the strong probability that there will be some misunderstanding as to the terms of the contract between the parties. For all ordinary purposes, an oral contract of agency is just as binding as a written contract, provided its terms can be proved.

Usually an agent is appointed in *writing;* either a formal contract is drawn up and signed by both parties, or a letter or a telegram is sent and the other party replies to it, in which case the letter or the telegram and the reply thereto would constitute the written contract.

When an agent is appointed to vote at a corporate meeting, his written appointment is called a *proxy,* and is usually signed by the principal and by a witness. Some corporations require acknowledgment of the proxy before a notary public; but this is not usually necessary. (See Chapter LXXXIII, Forms 21-23.)

When an agent is appointed to sell land, or to perform any important act, or to conduct any important negotiations, he is given formal power of attorney under seal (see Form 18). A power of attorney is a particular kind of written contract of agency. Where land is to be deeded or a mortgage executed, the agent is called an attorney in fact

[1] For forms of agency contracts, see Chapter LXXXIII, Forms 16-23.

and it is absolutely essential to have the formal power of attorney executed just as carefully as a deed, and acknowledged before a notary so that it can be filed in the registrar's office with the deed or the mortgage.

In many cases of agency, the agent is appointed to an office where he exercises certain powers *without any formal specification* of what he can do and what he cannot do. In such instances, the agent will be held to have all the powers usually attached to such an office. For instance, a ticket-seller for a railroad is an agent of the company and has certain well-known powers; beyond these he cannot go.

An agent appointed to conduct a given business for his principal has authority to do all things incidental or essential to the performance of his duties as agent. If the duties of the agent involve the management of a mercantile business, and it is necessary to employ salesmen, the principal will be bound for the salaries whether he has given express authority to the agent to employ assistants or not.[2]

Notes:

1. An oral contract is hard to prove, and is liable to be misunderstood.
2. An agent should be appointed by a written contract signed by both parties.
3. An agent to sell or to mortgage land must be appointed by a sealed power of attorney executed and filed like a deed.
4. An agent conducting business for his principal has the usual powers of anyone doing such a business.

§ 110. Express Appointment

The express appointment of an agent requires a specific designation of the agent by the principal.

Usually the appointment of an agent is *express*. It consists

[2] Baldwin v. Garrett, 111 Ga. 876.

of a definite contract for the agent's services. Most agents are appointed in this way.

The *express authority* of an agent is that authority which the principal directly grants to him. This includes of necessity (whether the agency is general or special) all such powers as are necessary and proper as a means of effecting the purpose for which the agency was created.[3]

The apparent authority of an agent is that which the principal knowingly permits the agent to exercise, or which the agent exercises without objection from the principal.

Notes:

1. An express written appointment of agency is the most satisfactory arrangement for all concerned.

§ 111. Implied Appointment

The appointment of an agent is implied when it is just to imply it from the circumstances. If A stands by and sees B sell goods which belong to A and makes no protest, but acquiesces, A will be held to have appointed B his agent and will be bound by B's transactions.

When in the usual course of the business of a corporation an officer has been allowed, in his official capacity, to manage its affairs or to make certain contracts, his authority to represent the corporation will be inferred from the manner in which he has been permitted by the company to conduct its business.[4]

A wife, as the domestic manager of the house, may buy all things that are naturally and ordinarily necessary for the management of a household. She may contract for household supplies, domestic service, medical attendance, articles of clothing for the use of herself and children, suitable to the style in which the husband lives. It is implied that she is authorized to do this, and the husband is held responsible for the cost.

[3] Dispatch Ptg. Co. v. Nat'l. Bank, 109 Minn. 440.
[4] Martin v. Webb, 110 U. S. 7.

She is not held to be authorized beyond this, unless expressly made the agent of the husband for some particular purpose, in the same manner in which he would appoint a stranger.

Notes:

1. An agent's authority should be expressed by a written contract.
2. But an agent's authority may be implied from the conduct of his principal.
3. An agent placed in a position requiring authority has implied authority to do all things that are necessary.

§ 112. Ratification

Where one acts as the agent of another without authorization, his acts as agent may be ratified by the acquiescence of the principal or by the principal's taking the benefit of the agent's performance. It happens not infrequently that an agent, appointed for a definite set of duties, sees opportunity to do something for which he has no authority, but which will benefit his principal. Sometimes a person volunteers to act as agent for a principal whom he has not had opportunity to consult. After an unauthorized act of this kind has been done, the principal may (when he learns of it) (1) refuse to be bound by it, (2) *expressly ratify* the act, or (3) if he takes the benefit of the action he will be held to have ratified it.

If the principal ratifies the unauthorized action, he must ratify it as a whole. He may not ratify part of the agent's act and refuse to recognize the other part.

Ratification, to be effectual, must be made with full knowledge of everything which has any material bearing on the transaction.

Notes:

1. Ratification has the same effect as an original authorization.

2. Ratification may be express, or by acquiescence.
3. Taking the benefit of an unauthorized act (with knowledge of the circumstances) is a ratification of the act.

§ 113. Sealed Contracts

An agent in order to execute a deed or sealed instrument must be appointed by an instrument of like formality.

For most purposes an agent may be appointed by a simple written agreement or by word of mouth; and sometimes his authority may be implied from circumstances. When, however, land is to be conveyed or mortgaged, or some important instrument like a deed or a mortgage which is to be recorded in some office of public registry is to be executed, it must be done by the principal himself or by an agent appointed by power of attorney executed with all the formalities of a deed or instrument for record filed in the same office of public registry as the deed itself.

The most important feature of a deed is the fact that it is *executed under seal.* It is usually witnessed and then acknowledged before a notary public. The power of attorney requires the formal execution and the same acknowledgment that a deed would require. The doctrine may be summarized thus: An agent to contract under seal must be appointed under seal.

> Authority under seal is necessary to enable an agent to bind his principal by a deed or other instrument under seal. It is a technical, but a thoroughly settled rule of the common law, that an agent cannot bind a principal by a deed of conveyance, bond or other instrument under seal, unless his authority to do so is also under seal.[5]

> There is no doubt about the general rule that a power to execute an instrument under seal must be conferred by an instrument under seal executed with equal solemnity.[6]

[5] Clark & Skyles on Agency.
[6] Long v. Hartwell, 34 N. J. L. 122.

Notes:

1. A deed must be executed by the owner of the land or by his agent or attorney appointed under seal.

§ 114. Appointment of Subagents

Unless expressly or impliedly authorized, an agent is not empowered to appoint a subagent.

When an agent is appointed, he is appointed because the principal places special trust and confidence in him. It would not be right for an agent to have power to delegate his authority to someone else, whom the principal might not care to have represent him. This is a maxim of the law—that delegated authority cannot be passed on to someone else unless the agent has been expressly authorized to do so, or unless it is customary in the particular line of business.

A distinction is to be taken in this matter between acts requiring discretion and acts that simply involve some mechanical performance. An agent authorized to perform some important work could employ others to help him in the mechanical details. If it were customary, he could employ an assistant superintendent and supervisors, but he could not delegate the active supervision to someone else.

Notes:

1. An agent cannot appoint a subagent.
2. If he attempts to do so, (1) his appointee will have no power, and (2) the agent will be personally liable for the subagent's wages.

§ 115. Servants and Employees

An employee or servant may also be an agent if authorized to do business with third parties.

The distinction between an employee or servant and an agent is that the employee or servant is employed to do certain things and has no relation with third parties, while an agent

is employed to represent the principal in dealings with third parties. It happens in many cases that an employee is also an agent, but his functions as an agent are distinct from his functions as an employee. A servant employed in domestic activities becomes an agent when he or she is authorized to buy supplies, or to do anything else that involves dealing with third parties. (See § 119.)

If a delivery man has been in the habit of making collections, it would be safe to pay him. If a package has been sent C. O. D. the bearer is thereby authorized to receive the amount.

Notes:

1. It is not safe to deal with a servant or an employee unless he or she is authorized to do business with third parties.
2. It is not safe to pay money to truck drivers, delivery men, and errand boys, unless it is known that they are authorized to make collections.

§ 116. Void Contracts of Agency

Contracts of agency for an unlawful purpose, as is the case with other contracts (see § 36), are illegal and cannot be enforced.

For example, a contract to conduct a gambling establishment would be absolutely void. The principal could not compel the agent to carry out the contract, and the agent could not collect any compensation for the unlawful service.

A contract to procure an agent to commit a positive crime, to bribe legislators, to forge a will, or to commit a burglary, is void absolutely and entirely.

Any contract opposed to public policy is void.

Certain things are said to be against public policy. To employ a lobbyist to influence legislation; to contract with a lawyer to organize a trust in restraint of trade; to employ a

broker to negotiate a marriage; and other similar acts are held void because they are opposed to public policy.

In any contract to do an unlawful act, both agent and principal are liable to damages and to criminal prosecution. If an agent or an employee were engaged to smuggle in silks, both the subordinate and the principal are liable to prosecution and whatever penalties are imposed. In legitimate business the agent acting within his authority makes his principal liable but does not make himself responsible. In any illegal business, the responsibility attaches to principal and agent alike. (See § 128.)

Notes:

1. Any contract for an illegal or immoral purpose is void.
2. An agent employed to do wrong cannot collect any compensation.
3. In a contract to do wrong, both principal and agent will be liable to damages and to criminal prosecution.

CHAPTER XXIII

THE PRINCIPAL

§ 117. Principal's Duty to Agent

The principal's duty to his agent is to pay him his compensation and proper expenses. The relation of the principal to the agent is one of contract. The agent agrees to render services and the principal promises to pay him a salary, a commission, or a fixed sum. If no amount of compensation has been fixed, the agent will be entitled to whatever his services are reasonably worth. Unless provided otherwise, the principal is bound to reimburse him for whatever expenses he has properly incurred. The contract should be a written one to avoid misunderstandings and to supply evidence of what the agreement really was.

The usual rules which govern employment prevail in this relation. If the principal terminates the agency before the end of the period of employment, he must compensate the agent for the unexpired term less any amount the agent can secure from some other employment. If the agent were to be paid a commission or a gross sum and the principal were to terminate the agency unreasonably, the principal would be liable to pay damages for the breach of his contract. If the agent had completed his undertaking, even though the principal did not take advantage of what the agent had done, the agent nevertheless would be entitled to full payment for his services.

In a Missouri case, one Gelatt, a real estate agent, was employed by the owner of a business block to find a purchaser for the property. He found a buyer, but the owner advanced

the price and broke up the deal. The court decided that Gelatt was entitled to his full compensation.[1]

If the principal makes it impossible for the agent to complete the undertaking, he must compensate the agent.

Notes:

1. The principal's duty to his agent is simply to deal fairly. An express contract in writing will prevent misunderstanding.

§ 118. Principal's Duty to Third Party

If the principal leads the third party to think that the agent has authority beyond his express authorization, the principal will be bound by whatever the agent does in the exercise of his apparent authority. In many such cases, the principal becomes bound, not by any positive thing which he has said or done, but because of his acquiescence in what the agent was doing, or his failure to protest at the proper time. In other cases the principal has allowed the agent to do certain things beyond the latter's authority; and this has continued until a course of dealing has become established. In all such cases, third persons are justified in assuming that the agent's apparent authority is real, and the principal will be bound.

The principal is liable for all acts done by the agent within the *apparent,* as well as *actual,* authority given. (See § 111.) Third parties dealing with an agent do not know his secret instructions, and whatever authority the agent appears to have can be used by him to bind his principal. The third party must, however, (in good faith) believe that the agent has the authority.[2]

An agent to sell goods who has possession and is in position to deliver is authorized to receive payment; but if he is not in possession of the goods he is not authorized to receive payment.

[1] Gelatt v. Ridge, 177 Mo. 553.
[2] Johnson v. Hurley, 115 Mo. 513.

Usage and trade customs count heavily in deciding what constitutes the apparent authority of an agent.

Notes:

1. When an agent is appointed, he is given as much authority as his position seems to warrant.
2. Secret instructions or limitations on the agent's authority do not bind third parties unless such instructions are known to these parties.

§ 119. Principal's Liability

A principal is liable for all fraudulent, negligent, or wrongful acts of his agent in the scope of his employment. If this were not so, it would be possible for a man to perpetrate all manner of fraud and wrong, and to escape punishment by employing some agent of no repute to do the dirty work. A principal is liable for carelessness, deceptions, false pretenses, or wrongful acts of any kind committed by the agent in carrying out the purposes of his principal.

The principal is liable for any damages to third persons arising from the mistakes or the negligence of an agent or an employee while acting in his service.

In a case in Rhode Island, a salesman suspected a woman customer of stealing a package of spoons. He detained her, sent for a policeman, had her taken to a police station and searched. She brought suit against the firm that employed the salesman for the wrongful arrest and search, and was awarded damages. The court said:

> If in the performance of his duty he, the salesman, mistook the occasion for it or exceeded his powers or employed an improper degree of compulsion, the mistake and the excess must be answered for by the master.[3]

If an automobile salesman takes out a machine belonging to his employer to show to a prospective customer, and care-

[3] Staples v. Schmidt, 18 R. I. 224.

lessly runs over a foot traveler, the employer will be responsible. If the salesman takes the machine out after hours for his own pleasure and does the same thing, the employer will not be responsible, because the accident did not occur within the scope of the salesman's duties.

Notes:

1. A principal is responsible for whatever is done by his agent within the scope of his employment.
2. A principal is not responsible for the acts of his agent done outside the scope of his employment.

§ 120. An Undisclosed Principal

An undisclosed principal may take the benefit of any contract made by his agent. As has been stated, an agent may conceal the fact that he is acting for a principal. In such a case, the agent renders himself personally liable, but a principal has the right to take whatever benefit may come from any advantageous contract made by his agent. The undisclosed principal is liable if the third party discovers his existence. With this liability the principal has the right to take the benefit of the contract.

The third party upon discovery of an undisclosed principal, may hold responsible either the agent or the undisclosed principal. The third party may bring suit against both principal and agent, though he may recover from but one.

Byington v. Simpson was a case where a building contract was signed "J. B. Simpson, Agt." The third party knew that Simpson was in fact contracting for his wife. The wife was held liable though her name was not mentioned.[4]

Notes:

1. The agent who does not disclose his principal takes the entire responsibility on himself.
2. The undisclosed principal is liable when discovered.

[4] Byington v. Simpson, 134 Mass. 169.

CHAPTER XXIV

THE AGENT

§ 121. Agent's Duty to Principal

An agent is, in the line of his duties, subordinate to his principal. Therefore, it is an essential feature of his employment that he should obey orders, act with good faith, and use such prudence, skill, and diligence in his duties as are requisite for their proper discharge. He must, *if necessary,* keep *proper* accounts and render statements to his principal. He cannot delegate any duty demanding discretion to others without special authority. If he does not do all this, if he fails in his duty, he may be discharged, his compensation may be denied, and he may be responsible in damages.

Any profits made in the course of an agent's employment belong entirely to his principal. An agent may not use his agency for his own advantage.

One Cummings, an agent for the sale of stock for the Diamond Match Company, sold stock of the company amounting to $170,000 at par for $200,000, and kept the profit of $30,000 for himself. Later this was discovered by the company, which brought suit and recovered the whole amount.[1]

In making a contract with an agent or confidential employee, it is safest to contract that he shall not at any time, either while he is employed or thereafter, reveal or use for the benefit of others any special information, secret processes, lists of customers, or other private matters that may be learned in the course of his duty. The courts will protect such an agreement.

[1] Graham v. Cummings, 208 Pa. St. 516.

In a Michigan case, a party employed in a manufactory of fly paper, under contract not to use methods elsewhere, after severing his connection with the factory, made plans to give others the benefit of his information. The court granted an injunction to prevent him from revealing the processes.[2]

Where a salesman or solicitor is employed to work up trade, he necessarily becomes familiar with the list of customers. In such a case, a contract with an agent that he shall not, for a period of years, engage with any other house in the same line doing business in the same territory, will be sustained by the courts.

What is said as to the duty of the agent here refers to a general agency, where the agent gives his entire services to one principal. In cases of special agency, what is said of the agent's duty applies only so far as is necessary to effect the object of the agency. A bank may be an agent to collect a draft, but is not called upon to exercise general obedience, loyalty, etc.

Notes:

1. A general agent must be obedient, loyal, careful, skilful, honest, and of good habits.
2. A special agent is required to exercise only such qualities as are requisite to effect the purpose of his agency.

§ 122. Agent's Obedience

Disobedience is good cause for discharge or refusal to compensate an agent, and renders him liable for any resulting damage. It is an agent's duty to obey orders; and by so doing he relieves himself of any responsibility in case of misadventure.

If, however, circumstances should arise which make it necessary to act contrary to the instructions he has received,

[2] Thurm Company v. Tloczynski, 114 Mich. 149.

it is his duty to do this, provided, of course, that it is impossible to consult his principal before acting. Emergencies may occur where it is the duty of the agent to do the best thing possible, even though it involves his disregarding orders. Where no emergency exists, however, the agent violates his directions at his own risk. It is the principal's right to decide how he wishes his matters attended to; and if the agent obeys and loss ensues, it is the loss of the principal. If a shipping agent or railroad varies directions that goods are to go over some particular line, the agent or the railroad incurs the liability of an insurer.

An agent who has been instructed to sell for cash has no authority to allow credit. If he gives credit and loss ensues, he is responsible. If he is authorized to buy or to sell at a certain price, he may not go beyond this. This is not to be understood as prohibiting trifling departures and immaterial variations from exact instructions. The law does not regard negligible things.

An agent who is instructed to ship goods or to remit money in a particular way must obey his instructions to the letter.

Notes:

1. An agent must obey orders if he does not want to make himself liable.
2. When an emergency exists he may act contrary to instructions.
3. A principal should, where possible, give explicit orders to his agent.

§ 123. Agent's Good Faith

Good faith is essential on the part of anyone acting in the capacity of agent. If an agent is found to be working for his own interests as opposed to those of his employer, he may be discharged summarily. If he makes false reports or deceives his employer, or defrauds him in any way, he may be dis-

charged; and he will have forfeited any claim to compensation. If he learns of anything in the line of his business to the principal's advantage, it is his duty to let his principal know and have the benefit of it.

The Agent Must Not Act for Both Parties. An agent may not represent both parties to a transaction. He may not earn a commission from both buyer and seller. This is a rule that holds good everywhere. But it is said that a double agency may be valid where both parties know of the double agency and agree to it; it is then understood that the agency requires no independent discretion.

The Agent Must Not Act for Himself. If the agent is employed by a principal to manage his business, what he does is done for the principal. It is not right for the agent to be interested adversely; and all the profits that are made in connection with the principal's business belong to the principal, unless he has previously agreed to give the agent a share of the profits as part or all of his compensation.

If the agent in the course of acting for his principal obtains any particular advantage to himself, and the principal discovers it, the latter can hold the agent accountable for the profits or the property so obtained.

A broker, in a Michigan case, sold land to a party whom the owner had previously excepted from those to whom the broker might sell. It was held that the latter was not entitled to commission.[3]

In a Massachusetts case, an agent made a sale of some property, and in rendering the account to his employer charged him $50 as paid to an attorney for examining the title, whereas he really paid only $25. The court held that he lost his right to commission.[4]

An Agent Must Not Compete With His Principal. An

[3] Ranney v. Henry, 160 Mich. 597.
[4] Little v. Phipps *et al.*, 208 Mass. 331.

agent must not be interested adversely to his principal. Neither may he represent and sell goods for a competitor of his principal. An employer has a right to his agent's absolute loyalty. If an agent uses his knowledge of his principal's affairs to secure an advantage for himself, the courts will compel him to make restitution. The law moves on a high plane in matters of this kind.

The Agent Must Be of Good Habits. Any habits which interfere with the proper discharge of the agent's duty are sufficient reason for his discharge. Drunkenness in the daytime or while attending to business is undoubtedly sufficient reason for dismissal. As in the case of other employees, the circumstances must be considered.

Generally speaking, an agent may be discharged for drunkenness, gambling, or licentiousness. Possibly, the courts would not in all cases justify too close an inquisition into the private habits of employees. A bank, however, employs detectives; and if an employee indulges in loose living he is discharged and has no recourse. Usually an agent who is discharged for any reason of this kind cannot afford to risk the notoriety involved in an attempt to hold his employer for damages.

Non-Payment No Excuse for Non-Performance. The fact that the agent is unpaid does not affect his responsibility. The agent's liability does not depend upon how well he is paid for what he does, or whether he is paid at all; for, if he undertakes to do anything for another, he must do it well; and he is responsible in case of bad faith, negligence, or lack of skill.

Notes:

1. The doctrine of the law on the subject of the agent's good faith is on an exceptionally high plane.
2. The agent must not act as the agent of both parties unless both know of and agree to it.
3. The agent must not act for himself in the principal's affairs.

4. The agent must not compete with his principal.
5. The agent must be of good habits.

§ 124. Agent's Care, Skill, and Diligence

If anyone undertakes the duties of an agent, he is assumed to have the necessary skill and ability to perform the said duties. In all matters connected with his agency, he is expected to act as an ordinarily prudent, careful business man would act in the conduct of his own affairs. If the agent is a lawyer, he undertakes to have professional ability to represent his client in an adequate manner. If he is a financial agent and invests his client's funds imprudently, he is responsible.

> The rule is well settled that an agent is not only bound to act in good faith, but to exercise reasonable diligence, and such care and skill as is ordinarily possessed by persons of common capacity engaged in the same business.[5]

> A firm engaged as insurance brokers, if it takes out policies for its clients in irresponsible companies, will, in event of loss, be required to make good the damage resulting from its neglect to use proper care.[6]

Custody of Funds. It is the duty of the agent to account for all funds and property of the principal which come into his possession. In this particular he must obey the rules that govern one person who holds the property of another.

The agent should not deposit funds belonging to his principal to his own bank account; but should open a separate account in the name of his principal, or in his own name *as agent*. If he does this, he is not responsible in the event of the bank's failure and the loss of part or all of the funds. In the same way, it is his duty to turn all money and other property in his possession over to the principal or to the principal's order.

[5] Whitney v. Martine, 88 N. Y. 535.
[6] Sheppard v. Davis, 42 A. D. (N. Y.) 462.

Any money held by an agent for his principal is a trust fund.

In an Indiana case the judge said:

> In case it becomes the duty of an agent or a trustee to deposit money belonging to his principal, he can escape risk by making the deposit in his principal's name; or by so distinguishing it on the books of the bank as to indicate in some way that it is the principal's money. If he deposits it in his own name, he will not in case of loss be permitted to throw the loss on his principal.[7]

Notes:

1. The theory of the law in these matters is better than the results in actual practice. It is in most cases impossible to obtain legal redress for the common lack of care, skill, and diligence in agents.
2. In all matters relating to the care and the custody of money belonging to others, too great care cannot be exercised.
3. The treasurers of clubs, informal organizations, and unincorporated associations, should observe the rules that have been given for agents in charge of funds.

§ 125. Agent's Duty to Third Party

Observance of the usual rules of fair dealing and honest treatment is the only duty owed by the agent to the third party. The agent is the representative of his principal, and is to work in the interests of his principal. If he resorts to trickery or fraud, he himself is liable for any damages caused to the third party. An agent cannot be held for a legitimate business contract within the scope of his authority. He binds his principal, not himself. But his principal cannot authorize him to do wrong; and if he does wrong both he and his principal are held.

[7] Waltner v. Dolan, 108 Ind. 500.

The agent may legally do whatever the law allows his principal to do. The law is not at its best when it defines the rights of buyer and seller. The better business houses, in their actual practice, act on a plane far higher than that which the law compels. In other words, good business prescribes a much higher standard of morality in the matter of sales than does the law.

On this account the standards of good business are given here, rather than the legal requirements. Let your dealings be characterized by fairness and liberal treatment. Deal with the third party in such a manner that you can deal with him again. All good and permanent business is to the advantage of both parties. Make every customer a lasting business friend. Treat him as you would like to have him treat you in like case.

Notes:

1. If an agent has a principal who does not believe in the above standard of good business, he had better look for another job.

§ 126. Limitation of Agent's Authority

The agent rarely has unlimited authority. In established positions, such as that of a bank cashier, a railroad conductor, or a retail salesman, the duties are settled and the authority of the incumbent is known to his principal, to those he deals with, and to himself. Usually an agent in such a position keeps to his routine, and his powers are entirely familiar to all concerned.

As between his principal and himself, the agent's authority is limited (1) by the limitations usual to the employment, and (2) by the limitations expressed in the agreement. If he exceeds these limitations, he may be discharged from his position, and may be held for damages if he is responsible.

In dealing with third parties, the agent, in all those cases where his apparent authority exceeds his real authority, may

bind his principal. In such an event, the agent must answer to his principal for his abuse of authority.

Notes:

1. An agent has the usual authority pertaining to his position, unless restricted by special agreement.
2. An agent has always such authority as his agreement with his principal permits.
3. An agent may bind his principal wrongfully when his apparent authority exceeds his real authority.

§ 127. Agent's Fraudulent Conduct

The question of the agent's bad faith to his principal has already been discussed. If he perpetrates a fraud on a third party while transacting his principal's business, both principal and agent are liable. The agent will not be able to shift responsibility to his principal. A principal cannot authorize his agent to commit fraud.

In Weber v. Weber, the action was against Caroline Weber for stating positively that there was no mortgage on a piece of land which she was selling as the agent of her husband. The court said:

> All persons who are active in defrauding others are liable for what they do, whether they act in one capacity or another.[8]

In a case where the president of a medical institute was made the party in a proceeding against the institution for defrauding a patient, the judge said:

> We are not aware of any rule of law which will excuse and absolve a person from the consequence of his own wrong doing, because he happened to be the agent of another at the time of the perpetration of the wrong.[9]

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[8] Weber v. Weber, 47 Mich. 569.
[9] Hedin v. Minneapolis Medical Institute, 62 Minn. 146.

Notes:

1. An agent cannot use his agency to protect him in doing wrong.
2. In case of fraud or misrepresentation, the agent as well as the principal is liable to the person injured.

§ 128. Agent's Liability

The agent makes himself liable with his principal, as we have seen, when he is guilty of any fraudulent conduct.

He also makes himself liable when he exceeds his authority, unless the third party knows the nature of the agent's action.

Where the business is illegal, the agent is liable with the principal.

In most cases where an agent deals with third parties, the third parties depend upon the agent to inform them correctly as to the extent of his authority. If the agent deceives them as to this, he makes himself personally liable to the third party to the same extent that he would if he had made the contract in his own name instead of that of his principal.

One Kroeger insured his premises through Pitcairn, an agent. Pitcairn verbally told Kroeger that he could keep a small amount of gasoline on the premises without making his policy void. Pitcairn had no authority to do this. The premises were burned, and Kroeger could not recover from the insurance company on account of the storage of gasoline. The court did, however, allow him to recover his damages from Pitcairn. [10]

If the agent has apparent authority but is limited by private instructions from his principal, he can nevertheless bind his principal by his contract within the scope of his apparent authority. In such a case, he is liable to his principal for any unwarranted action.

It happens sometimes that an agent deals with third parties

[10] Kroeger v. Pitcairn, 101 Pa. St. 311.

and assumes to be the principal; i.e., he does not represent himself to be an agent, or disclose the fact that he is acting for someone else. In such a case he will be held personally, as though he were the principal. This is plainly just and right.

Where an agent represents a principal who is non-existent or irresponsible, he binds himself. On occasion agents have represented themselves as having a principal who did not exist —in such cases they bind themselves. Thus, parties acting as directors in a non-existent corporation may be held.

If an agent represents any irresponsible body, such as a social club, a meeting, or any informal organization, he will in all such cases render himself liable. If the agent is authorized by a motion, all members who voted for the motion are liable, and those who are forced to pay can hold for contributions all others who joined in authorizing the expense.[11]

The Northeastern Pigeon & Bantam Society, a voluntary association, held an exhibition of fancy stock and offered premiums. The expense exceeded the receipts. The court held that those members who paid the loss could bring suit to compel all the other members who had voted to hold the exhibition to pay their pro rata.[12]

A common case under this general head is that of a promoter who incurs liabilities for a corporation before it is incorporated. Until the corporation has come into being, it cannot appoint an agent; therefore the general rule is that the corporation cannot be bound, and that those who deal with the promoter must look to him for compensation.

> The general doctrine that no one is authorized to contract for a corporation before it is formed, applies to all contracts with and by promoters. The promoter himself is liable on these pre-corporate contracts, unless otherwise expressly provided; but the corporation is not.[13]

[11] Lewis v. Tilton, 64 Iowa 220.
[12] Ray v. Powers, 134 Mass. 22.
[13] Conyngton's "Corporate Organization and Management" (Edition of 1917), §32.

Where an agent commits an assault in the discharge of his duty, he may be held responsible.

The agent in charge of the grounds of a fishing club in Kentucky, assailed a party whom he accused of trespassing. The party assaulted brought suit for damages against the agent and the club, and got judgment against both.[14]

If the agent got into a quarrel independently, and not in the discharge of his duty, his principal would not be affected.

Sometimes, even when the agent acts in entire good faith, he may become personally liable for his blunders. For instance:

In a California case, Wilson, a broker, sold some mining stock for a customer. The stock turned out to have been stolen from a party named Swim, who brought suit against Wilson for the value of the stock. The court held that the principal who employed Wilson to sell the stock had no title and could give none to Wilson, who was therefore compelled to pay the value of the stock.[15]

Notes:

1. An agent is liable for fraudulent conduct.
2. An agent is liable for exceeding his authority.
3. An agent is liable if he does not disclose his principal.
4. An agent is liable if he represents a non-existent or irresponsible principal.
5. An agent is liable for wrongful acts within the scope of his employment.
6. An agent may be liable for blunders.

[14] New Ellerslie Fishing Club v. Stewart, 123 Ky. 8.
[15] Swim v. Wilson, 13 Cal. 126.

CHAPTER XXV

THE THIRD PARTY

§ 129. Third Party's Relation to Agent

Strictly speaking, the third party has no relation to the agent. The agent represents the principal, and the third party is dealing only with the principal. When the agent goes beyond his powers, then he makes himself responsible and may be held; the same is true when he represents an undisclosed principal, or a fictitious principal. The third party should know that the agent with whom he is dealing has authority to represent his principal, and how far this authority justifies the action of the agent.

A third party dealing with an agent in excess of his authority does so at his own risk. It is obvious that an agent cannot go beyond his authority. He is authorized for such general or special purposes as the principal indicates, and further than this he may not go.

Where an agent is empowered by a written instrument to do certain things, it is very plain that he has no authority to do anything more than what is specified; but as in most cases of general agency the agent has the right to do everything incidental to his main agency business, it is sometimes not easy to tell what is in excess of his authority and what he has the right to do.

Law sold goods amounting to $320 to Stokes. The sale was made by Sheridan, Law's agent or salesman. The sale was on a credit till end of month. Next day the goods were shipped and a bill was enclosed in a letter. The letter said, "Please remit amount direct to me." The bill had on its face in red ink, "All remittances on account, or in settlement of

bills, must be made direct to the principal." About a month later Stokes paid Sheridan the amount of the bill. Sheridan absconded with the money; Law brought suit and obtained judgment.[1]

In this case the salesman had no authority to collect. The case was clear for the plaintiff, Law, because he had given notice on his billhead and in his letter of his limitation on the salesman's authority. Usually there would be more trouble in a case of this kind because the proof would not be so clear. The agent himself would be liable to suit by the third party; but in such a case the probability would be that the agent was judgment-proof or had left for fresh fields and pastures new.

In each case the third party should know for his own safety just what power the agent has to bind his principal, and that the principal is responsible. He cannot always rely on the representations of the agent himself as to the extent of his authority. It is the third party's duty to make due inquiry into the matter, as in case of a dispute later the burden of proof is on the third party to show that the agent had authority for this particular act.

Notes:

1. It is unsafe for a third party to deal with an agent without sufficient information as to his authority.
2. Care should be taken never to make payments to an unauthorized agent.
3. Where salesmen are not expected to collect payment, customers should be informed of the fact.
4. In dealing with an agent, it is necessary to know whom he represents and how far his authority extends.

§ 130. Third Party's Relation to the Principal

The third party is really dealing with the principal, and the

[1] Law v. Stokes, 32 N. J. L. 249.

agent is merely the means of communication. When the contract is signed, the name of the agent is attached as agent, and the principal, not the agent, is bound. Therefore the relation between the third party and the principal is the same as between any other parties to a contract.

The third party is brought into the contract relation as a principal, and after that in most cases the agent is disregarded. The principal and the third party contract with each other, and, if the contract has not been executed, each has the right to compel the performance or to recover damages for any breach or failure in performance. In any dispute in regard to the contract, the resulting suit will be between the parties, and the agent will not figure save as a witness able to give material evidence. If there has been fraud or false representation on either side, the fact that the transaction has been negotiated through an agent does not affect the liabilities or the remedies.

Notes:

1. When dealing through an agent, the third party should bear in mind that it is the principal with whom he contracts.

CHAPTER XXVI

TERMINATION OF AGENCY

§ 131. Termination by Fulfilment

The agent's authority is terminated when he completes the purposes of his agency, or at the expiration of the period for which he was engaged. It is obvious that if an agent has been employed to purchase a farm and the farm has been purchased, the agent's authority is ended; or if a salesman has been engaged for a year to sell goods, it is plain that the agency unless renewed terminates at the end of the year. Generally, the rule is that the agency ends at the termination of the period for which the agent has been engaged, or the completion of the undertaking for which he has been retained.

The principal should in some way inform those who have been dealing with the agent that the agent no longer has authority to act. If the principal fails to do this, and the agent continues to act, the principal is bound.

Notes:

1. An agency terminates naturally (a) when the term ends, or (b) when the undertaking is completed.

§ 132. Termination by Either Party

The contract of agency may be terminated at any time by either the principal or the agent. It is obvious that the contract between principal and agent (like any other contract) may terminate at any time by agreement of the parties. It is also true that the contract (since it is one of mutual trust and confidence) may be terminated at will by either one of the

parties against the consent of the other party, except in the case of an agent having an interest in the subject matter; in which event the principal cannot terminate the relation without the agent's consent. (See § 134.)

If the principal and the agent contracted for a certain period of time or for a certain undertaking, and the principal revoked his authority without good cause, the principal would be liable to suit for damages by the agent for breach of contract.

> Where there is employment for a definite period of time, express or implied, and the agent is discharged without cause before the expiration of the period, the principal will be liable to the agent the same as in the breach of any other contract; in such cases the agent may elect to treat the contract as rescinded and bring an action to recover the value of his services and money expended.[1]

The agent can renounce his employment at any time. The courts will not force a man to work for another against his will. If, however, the agent has agreed to act for a certain time, or to do some particular thing, he may be liable to pay damages if he breaks off before the expiration of the period. Also, if he tries to act for someone else in the same line of business before the expiration of the term, it is probable that the principal could obtain an injunction to prevent his working for a competitor. In making a contract of agency, it is often customary to put in a clause providing that the agent shall not leave the employ of the principal and represent anyone else in the same line of business for a specified period of time after his contract terminates. (See § 121.)

If the subject matter of an agency is destroyed, the contract is thereby terminated. A case of this kind would be where a building which is to be leased by an agent is burned before the lease is effected.

[1] Glover v. Henderson, 120 Mo. 367.

Notes:

1. Either party may terminate a contract of agency at any time.
2. Either party breaking a contract of agency for a specified period or undertaking without just cause is liable in damages.
3. An agent who breaks his contract may be prevented during the term of agency from taking employment with a business competitor.

§ 133. Termination by Disability

An agent's authority is revoked by the death, insanity, or bankruptcy of his principal; in like manner the relation is destroyed by the death or disability of the agent. This is a principle of universal application. When a man dies, all contracts of agency cease at once; all powers of attorney, and every authority to anyone else to act for him are terminated. If in ignorance of his principal's death an agent did business for him, the business would be void and of no effect.

A case which often happens is that of a person of advanced years who gives personal property to an agent to deliver to someone else and then dies before the property has been turned over. In such cases the courts hold that the agency is revoked by the death of the principal, and the gift cannot take effect.

In an Illinois case, Mrs. Trubey had her lawyer take from a bank vault a metal box of jewels and securities. She made parcels of these and designated to whom each parcel was to go. Then she put them in charge of her lawyer, but set no time for delivery. He receipted for them and placed them in another vault. Within three months Mrs. Trubey died. The matter came before the courts for adjudication. It went to the Supreme Court of Illinois, which held that the lawyer was undoubtedly Mrs. Trubey's agent to deliver the property;

but when she died the agency was revoked by that fact, and that, as the property had not been delivered, it belonged to her estate and the people designated had no claim to it. The court expressed regret that it was not possible under the rules of law to give effect to what Mrs. Trubey evidently intended. It would seem that her lawyer was much at fault. [2]

The death of the agent also terminates the relation. When the relation of principal and agent is broken up by the sickness or the other disability of the agent, the condition will be the same as when any other employee finds his term of employment broken by disability. In all such cases the general rule is that the agent or the employee is entitled to recover for the time he acted, whatever the services were worth to the principal or the employer.

In a New York case it was held that where an agent is prevented by sickness or death from completing his contract, he or his executor is entitled to the value of the services actually rendered. [3]

Insanity of the principal likewise has the same effect as death. If insane, a principal can no longer contract himself, and neither can he contract by an agent. The insanity of the agent terminates the relation because he has no longer the capacity to represent his principal.

The bankruptcy of the principal, and in some cases of the agent, would destroy the relation. In the case of bankruptcy, the bankrupt can no longer continue his business, but it is taken over by the court or the trustees in bankruptcy; and as he cannot do business himself he cannot do it through an agent. Insolvency would not have this effect. (See Chapter LXXIV.)

If the principal parts with the subject matter, that terminates the agency.

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[2] Trubey v. Pease, 240 Ill. 513.
[3] Wolfe v. Howes, 20 N. Y. 197.

Notes:

1. An agent can act only for a party who can act for himself.
2. An agent's authority ends when the capacity of the principal to contract ends.
3. An agent's incapacity to act ends the relation.

§ 134. An Agent with an Interest

Where an agency is coupled with an interest, it cannot be revoked by the principal. Where the agent is also interested in the matter to be accomplished, it places him in a different relation to the principal; and the principal cannot at will destroy the relation. If, for instance, an agent is employed to sell a horse, and the agreement is that he is to advance the principal one-half the price and pay himself when he sells the horse, the principal cannot prevent him from selling the horse. The agent would have an interest in the matter himself, and could go on and do that which he had agreed to do.

The interest that causes a power of attorney to survive must be an interest in the subject matter of the agency and not in that which is produced by the exercise of the power.

Notes:

1. An agent with an interest in the property itself cannot be discharged, as he is to that extent a partner with the principal.

Part V—Negotiable Instruments

CHAPTER XXVII

FORM AND INTERPRETATION[1]

§ 135. The Quality of Negotiability

The negotiable instruments in ordinary use are (1) promissory notes, (2) drafts or bills of exchange, and (3) checks. The *quality of negotiability* lies in the fact that any person, not an original party, who takes a negotiable instrument in the ordinary course of business, may sue on it when due, in his own name, and the person who is the obligor will be compelled to pay it.

Any ordinary contract may be assigned by executing an assignment, but in such case the assignee merely steps into the shoes of the person who assigned it, and if there has been any reason, as between the parties, why it should not be paid, this can be set up against the assignee, if he brings suit, exactly as if he were the original party. If this were true of a note, no one would dare to discount it, for, when the time of payment came, any reason for non-payment that might exist between the original parties could be used to destroy the whole value of the note. Hence, for the convenience of business, the law of negotiable instruments has grown up, to protect the man who takes them "in due course of business."

"In due course of business" means taken before its date for payment, for a valuable consideration and without knowledge of anything that would affect the title. The law says:

[1] For forms of negotiable instruments, see Chapter LXXXIV, Forms 24-34.

A holder in due course holds the instrument free from defect of title of prior parties, and free from any defenses available to prior parties among themselves and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

Notes, drafts, and checks are used so extensively that the laws governing their transfer are of great importance. When the subject of uniform laws was brought up, the law of negotiable instruments was the first to be reformed and the one most widely adopted. The Uniform Negotiable Instruments Law as devised by the commissioners having the work in hand has at the present time been adopted by every state except California, Georgia, Maine, and Texas.

In discussing this subject, the Uniform Negotiable Instruments Law has been followed as closely as possible, and the quotations are from the text of the law.

The following are the requirements for negotiable instruments as laid down in the law itself:

§ 1.—An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer.

2. Must contain an unconditional promise or order to pay a sum certain in money.

3. Must be payable on demand, or at a fixed or determinable future time.

4. Must be payable to order or to bearer; and

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

§ 136. Certainty as to Sum

It is to be noted that the law allows certain variations as to the certainty of the sum:

§ 2.—The sum payable is a sum certain within the meaning of this act, although it is to be paid:

1. With interest; or

2. By stated instalments; or

3. By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or

4. With exchange, whether at a fixed rate or at the current rate; or

5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

§ 137. Promise to be Unconditional

The Uniform Law allows two variations of this:

§ 3.—An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or

2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional.

§ 138. Certain Future Time

The law clearly expresses that the time must be certain.

§ 4.—An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

1. At a fixed period after date or sight; or

2. On or before a fixed or determinable future time specified therein; or

3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

§ 139. Allowable Provisions

§ 5.—An instrument which contains an order or promise to do any act in addition to the payment of money is not ne-

gotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

2. Authorizes a confession of judgment if the instrument be not paid at maturity; or

3. Waives the benefit of any law intended for the advantage or protection of the obligor; or

4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

§ 140. Non-Essentials

§ 6.—The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or

2. Does not specify the value given, or that any value has been given therefor; or

3. Does not specify the place where it is drawn or the place where it is payable; or

4. Bears a seal; or

5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

§ 141. Payable on Demand

§ 7.—An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or

2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

§ 142. Payable to Order

§ 8.—The instrument is payable to order where it is drawn

payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or
2. The drawer or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees; or
6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

§ 143. Payable to Bearer

§ 9.—The instrument is payable to bearer:

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer; or
3. When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable; or
4. When the name of the payee does not purport to be the name of any person; or
5. When the only or last indorsement is an indorsement in blank.

The next paragraph provides that:

§ 10.—The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

§ 144. The Date

The law provides that the date on the face of the instrument is presumed to be the true date, and that it may be antedated or post-dated, provided it is not done for a fraudulent purpose. It is also provided that if a date is left blank, any holder may insert the true date. If an instrument is issued with any material particular left out, the holder may fill in the blanks.

§ 145. Delivery

A negotiable instrument is incomplete until delivery. If an incomplete instrument is completed and delivered without authority of the maker or drawer, it will not be valid unless it comes in due course to an innocent holder for value, in which case it will be presumed conclusively to be good.

§ 146. Rules of Construction

§ 17.—Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount;

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

§ 147. Signature

The signer of an instrument is liable, and anyone signing a trade name or assumed name will be liable personally. A

duly authorized agent can sign for his principal, and if he is duly authorized and signs as agent or in a representative capacity, he will not be personally liable.

If, however, he signs as agent without disclosing his principal, he will be personally liable.

The indorsement of a corporation or an infant passes the property in the instrument, though the corporation or infant may not be liable.

A forged signature is absolutely void and passes no right or title.

§ 148. Consideration

All negotiable paper is presumed to have been given for a valuable consideration, and everyone whose signature appears on it is presumed to have become a party for a valuable consideration. Any consideration that would support an ordinary contract will be sufficient. An existing debt would be a good consideration for a note or draft in settlement.

A holder is deemed a holder for value as to all parties before him on the paper if value has been given in exchange for the instrument at any time.

Anyone having a lien on a negotiable instrument, is a holder for value to the extent of his lien.

Absence or failure of consideration is not a good defense against a holder in due course for value.

§ 149. Liability of Accommodation Signer

Anyone who for accommodation signs his name to any negotiable instrument as maker, drawer, acceptor, or indorser, is liable to any holder for value. The accommodation signer is liable even though the holder knows that he signed for accommodation and that he received no value.

CHAPTER XXVIII

NEGOTIATION [1]

§ 150. Method of Negotiation

§ 30.—An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

§ 31.—The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

§ 32.—The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

§ 151. Blank or Special Indorsement

§ 33.—An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

§ 34.—A special indorsement specifies the person to whom, or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

[1] For form of indorsement, see Chapter LXXXIV, Form 26.

§ 35.—The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

§ 152. Restrictive Indorsement

§ 36.—An indorsement is restrictive, which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

§ 37.—A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

§ 153. Qualified Indorsement

§ 38.—A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

§ 154. Conditional Indorsement

The payee is not concerned about a conditional indorsement. Such an indorsement affects the rights of only those who take the instrument after the indorsement. A conditional indorsement imposes some condition on payment, as "Pay to Henry Alford upon delivery of motor truck, on March 1, 1918. Mark Anderson."

§ 155. Effect of Indorsement

An instrument payable to bearer may be indorsed specially to some particular person and after that may again be passed on by delivery.

§ 41.—Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

§ 42.—Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer.

§ 43.—Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

§ 44.—Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

§ 45.—Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.

§ 46.—Except where the contrary appears every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.

CHAPTER XXIX

RIGHTS OF HOLDER

§ 156. Holder in Due Course

The Uniform Negotiable Instruments Law uses the phrase "a holder in due course" to express the idea of an innocent holder for value, that is, one who has taken the instrument without knowledge of anything unusual in connection with it and who has given a valuable consideration for his title. Such a holder of a negotiable instrument may sue on it in his own name.

§ 52.—A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;

2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such were the fact;

3. That he took it in good faith and for value;

4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

§ 53.—Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

§ 54.—Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

§ 157. Defects of Title

§ 55.—The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained

the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

§ 56.—To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

§ 57.—A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

§ 158. Effect of Irregular Transfer

If a holder of negotiable paper not "a holder in due course" brings suit to collect, he must face all the defenses that can be brought up in a suit between the original parties. There may have been fraud as between the original parties or other cause why the note should not be paid. If it has come into the hands of an innocent holder, he can collect notwithstanding, but if the holder did not take the instrument in due course, any of the defenses existing between the original parties may be used against him.

CHAPTER XXX

LIABILITY OF PARTIES

§ 159. Liability of Maker, Drawer, and Acceptor

A draft is an order to some party to pay a named payee a sum of money. The one who makes the order is called the drawer. He is analogous to the maker of a note. The maker of a promissory note engages to pay the note he issues according to its tenor and admits the existence of the payee and his capacity to indorse. The drawer of a draft assumes the same liability, if it is not paid by the drawee and the necessary proceedings on dishonor are taken.

A draft may be presented to the drawee before payment to make sure that he will accept its obligations. If he will do this he writes "Accepted" on it and signs his name. He is then termed the acceptor. The acceptor by acceptance engages to pay the draft and admits (1) the existence of the drawee, his signature, and his right to draw the draft, and (2) the existence of the payee and his capacity to indorse.

§ 160. Liability of Indorser

When any person other than maker, drawer, or acceptor places his signature upon an instrument he is deemed to be an indorser.

> § 64.—Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:
>
> 1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.
>
> 2. If the instrument is payable to the order of the maker

or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.

§ 65.—Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be;

2. That he has a good title to it;

3. That all prior parties had capacity to contract;

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

§ 67.—Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

CHAPTER XXXI

PRESENTMENT FOR PAYMENT

§ 161. Necessity of Presentment

The maker or acceptor of a negotiable instrument is liable without presentment for payment, but if the drawer and indorsers are to be held, it must be presented for payment.

Presentment must be made on the due date except in the case of demand paper which must be presented within a reasonable time.

§ 162. Requirements for Presentment

§ 72.—Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf;
2. At a reasonable hour on a business day;
3. At a proper place as herein defined;
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

§ 73.—Presentment for payment is made at the proper place.

1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment.
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

§ 74.—The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

If payable at a bank, presentment must be made during banking hours unless payee has no funds there, in which case any hour before the closing of the bank will do.

§ 163. Presentment Excused

§ 82.—Presentment for payment is dispensed with:

1. Where, after the exercise of reasonable diligence presentment as required by this act cannot be made;
2. Where the drawee is a fictitious person;
3. By waiver of presentment, express or implied.

§ 164. When Due

§ 85.—Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

§ 86.—Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

CHAPTER XXXII

NOTICE OF DISHONOR

§ 165. Necessity of Notice

§ 89.—Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

§ 166. Effect of Notice

§ 92.—Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

§ 93.—Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

§ 167. Form of Notice

The notice may be informal provided it is clear so as not to mislead the party to whom it is sent. It may even be oral. It may be delivered personally or by mail. It may be given to the party or to someone acting as his authorized agent.

§ 168. Time of Notice

Where both parties reside in the same place, the time of notice is as follows:

§ 103.—1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following;

2. If given at his residence, it must be given before the usual hours of rest on the day following;

3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.

If the parties reside in different places, the rule is as follows:

§ 104.—1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.

Where a notice is duly deposited in the post-office, within the specified time, it is deemed a good notice.

The party receiving notice is allowed the same period of time to send notice to antecedent parties that was permitted to the last holder.

§ 169. Where to Send Notice

If the party has given an address, notice should be sent there; otherwise—

§ 108.—1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or

2. If he lives in one place, and has his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

Delay in giving notice is excused when caused by circumstances beyond the control of the holder.

§ 170. When Notice Is Not Required

Notice of dishonor is not required to be given to the drawer in either of the following cases:

> § 114.—1. Where the drawer and drawee are the same person;
>
> 2. Where the drawee is a fictitious person or a person not having capacity to contract;
>
> 3. Where the drawer is the person to whom the instrument is presented for payment;
>
> 4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;
>
> 5. Where the drawer has countermanded payment.

§ 171. Protest

Any negotiable instrument may be protested for non-acceptance or non-payment, but such procedure is not legally required, except for foreign bills of exchange.

If it is desired to avoid the expense of protest, it is necessary to attach notice of "No Protest" to any instrument sent through a bank for collection, otherwise the bank will give its notaries a chance to make fees.

CHAPTER XXXIII

DISCHARGE OF NEGOTIABLE INSTRUMENTS

§ 172. Discharge

A negotiable instrument is discharged:

§ 119.—1. By payment in due course by or on behalf of the principal debtor;

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

3. By the intentional cancellation thereof by the holder;

4. By any other act which will discharge a simple contract for the payment of money;

5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

A person secondarily liable on the instrument is discharged:

§ 120.—1. By an act which discharges the instrument;

2. By the intentional cancellation of his signature by the holder;

3. By the discharge of a prior party;

4. By a valid tender of payment made by a prior party.

Also by release of the principal debtor or by extension of his time of payment. Merely letting the time of payment go by without beginning suit is not granting an extension.

§ 173. When Not Discharged

When paid by a party other than the payee, the instrument is not discharged, but the party paying it may enforce payment against all prior parties on the instrument.

§ 174. Effect of Alteration

Any material alteration, unless made with the assent of all parties concerned, will invalidate the instrument, except as against the parties who made the alteration.

Any alteration is material which changes:

§ 125.—1. The date;

2. The sum payable, either for principal or interest;

3. The time or place of payment;

4. The number or the relations of the parties;

5. The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

CHAPTER XXXIV

BILLS OF EXCHANGE[1]

§ 175. Definition

§ 126.—A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

An inland bill is one drawn and payable within the state. Any other is a foreign bill.

§ 176. The Drawee

The drawee is not liable unless and until he accepts the bill. A bill may be addressed to two or more drawees, but not in the alternative, nor in succession.

Where drawer and drawee are the same person, or the drawee is fictitious, the holder may consider the instrument either a draft or a bill of exchange at his option.

§ 177. Acceptance

§ 132.—The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

The holder may require that the acceptance be written on the bill. It should not be written on another piece of paper. The drawee has twenty-four hours to decide whether he will accept or not. If he destroys it or fails to return it, he will be held to have accepted it. A qualified acceptance may be given.

[1] For form of draft, see Chapter LXXXIV, Form 32.

§ 141.—An acceptance is qualified which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;

2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;

3. Local, that is to say, an acceptance to pay only at a particular place;

4. Qualified as to time;

5. The acceptance of some one or more of the drawees, but not of all.

§ 178. Presentment for Acceptance

Presentment for acceptance must be made:

§ 143.—1. Where the bill is payable after sight or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or

2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

Presentment for acceptance follows the general rules given for presentment for payment. (See Chapter XXXI.)

§ 179. Protest for Non-Acceptance

A foreign bill *appearing on its face to be such* must be protested on the day of its dishonor by non-acceptance, if the owner desires to hold the drawer and indorsers.

§ 153.—The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;

2. The fact that presentment was made and the manner thereof;

3. The cause or reason for protesting the bill;

4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

§ 154.—Protest may be made by:

1. A notary public; or

2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more creditable witnesses.

§ 157.—A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

§ 180. Acceptance for Honor

An outside party may accept or pay a bill of exchange to save the credit of the drawee. In such case the acceptor makes himself liable, and if he must pay the bill, he has a right to be reimbursed by the person who should have paid it.

§ 181. Bills in a Set

§ 177.—Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill.

In such a case, the acceptance should be written on one of the sets and on one part only. If the drawee accepts more than one part, he may be held liable on each part as if it were a separate bill.

Usually, "where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged." [2]

When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and the part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

§ 182. Notes and Checks

§ 184.—A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by

[2] Negotiable Instruments Law, §178.

one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

§ 185.—A check is a bill of exchange drawn on a bank, payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

§ 186.—A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

§ 187.—Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance.

§ 188.—Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

§ 189.—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

Part VI—Insurance

CHAPTER XXXV

FIRE INSURANCE

§ 183. Introductory

Insurance is a contract by one or more parties to indemnify another for some loss which he may suffer in the future. If there is no loss, the agreement does not have to be carried out. The consideration is the premium paid. The written contract is called the policy.

Insurance is of various kinds. Fire, life, and marine insurance are the oldest forms of insurance. In addition, there have grown up accident insurance, burglary insurance, boiler, plate glass, and tornado insurance, credit, fidelity, title, and liability insurance, and many other special forms of insurance.

§ 184. Nature of the Contract

The contract of fire insurance is a speculative one; that is to say, the event on the happening of which the payment is to be made, namely, the fire, may never happen. The person insuring the building must himself have some actual financial interest in the property insured, otherwise it would amount merely to a bet on his part as to whether the building would be destroyed by fire or not, and would be a gambling contract and illegal. Also if the insurer had no interest in the building, and the building were destroyed by fire, it would be to the

profit of the insurer, and such an inducement might lead to crime.

Notes:

1. The exact interest of the person insured in the property should always be made a part of the policy, to show that the contract is legal.

§ 185. The Parties

There are two parties to a contract of fire insurance, the insured and the insurer. The person whose property is insured is called the insured. The person or company who insures it is called the insurer.

The insurer may be a single individual, or may be a corporation, or unincorporated company, or a group of individuals may get together and insure themselves. This last system of insurance is called mutual insurance. It is quite common in the country districts, where there may be a township mutual insurance. Whenever a fire occurs all the members of the fund are assessed proportionately to pay the loss.

In the non-mutual companies a fund is created by the payment of premiums, out of which the insurer pays for the losses which may occur.

A man who insures another has an insurable interest in that man's property and may protect himself by re-insuring it.

§ 186. Agents

Most insurance is taken out through agents. These may be of two kinds; those who are paid by the company and are the agents of the company, and those who act merely as brokers and solicit insurance from various companies. Agents acting for the company bind the company by their agreements if they have the power to close contracts of insurance. If the contract is required to be sent first to the company for its approval any agreement of the agent will not bind the company.

Sometimes by means of a short written agreement called a binding slip, or even by oral contract, an agent may bind his company for a certain limited or contingent period, as for instance, until the policy is made out or while the company is investigating the risk.

The laws of the various states are very strict with regard to insurance agents. In most of them an agent must receive a license from the state superintendent of insurance, or whatever officer exercises corresponding duties, in order to be permitted to act.

Notes:

1. In dealing with an insurance agent, always find out whether the company has to approve his agreements before relying on any changes he offers to make in the policy, etc. It is always safer to get the authorization of the company itself.
2. If you wish to act as an insurance agent, look up the law to see if you must take out a license.
3. If you deal through a broker instead of an agent of the insurance company, the broker is your agent.

§ 187. The Policy

The written contract between the parties is called the policy. Policies may be either open or valued. Most fire insurance policies are open. In an open policy the amount payable in case of loss is not fixed by the policy but merely the limits within which the company will be liable. A valued policy specifies the amount payable in the event of a total loss. Life insurance policies are valued. In fire insurance the company pays the actual value of the loss up to the amount named in the policy when a fire occurs.

It is a legal maxim that "to include is to exclude" and the insurance policy covers only what is stated therein. Some states allow verbal agreements with, or representations made

by, agents to be proved in order to alter the policy, but others do not. If it is desired to make other agreements not included in the policy form, they may be made in written form and made a part of the policy by referring to them in the policy.

Standard Forms of Policies. New York, Massachusetts, and some other states have a standard form of policy, which by law must be used by all insurance companies. Massachusetts adopted this form in 1881; New York in 1887. The Massachusetts form provides that a building must not be left unoccupied for thirty days or the insurance will lapse. In New York it must not be left for over ten days. In addition, the New York form contains certain stipulations, including the following:

The company may replace or repair the property instead of paying the loss and may take damaged property by paying the full appraised value for it. It does not hold itself liable under certain circumstances, such as war or riot, usurped power, by order of civil or military authority; likewise it is released by neglect of insured to use all reasonable means to save his property when it is menaced by neighboring flames. It is not liable if the insured made any false representations or practiced any kind of fraud in procuring the contract. The policy does not cover such things as deeds, book accounts, and shares of stock, etc., which merely represent obligations to the insured, nor does it cover money. It does not cover a building after it or part of it has fallen from any cause other than fire. These provisions may not be altered.

If a building is left vacant for ten days, or a factory runs after ten o'clock at night or is shut down for more than ten consecutive days; if the property is transferred to anyone, or if, without the permission of the company, the policy is transferred to anyone before a loss occurs, the policy becomes of no effect. Changes in the use or occupation of a building, or the installation of such things as electrical wires, gasoline

stoves, etc., must be consented to by the company or the policy is void. In the absence of a provision to that effect, a policy is not nullified by the erection of neighboring buildings that increase the risk.

The insured must be the absolute and sole owner of the premises, including the land on which the building is situated; and if a mortgagee or trustee wishes to take out a policy a clause must be inserted that the loss shall be payable "as his interest may appear." The company's consent must also be obtained to a chattel mortgage or the policy will be void.

A common clause, known as "builder's risk" provides that mechanics such as gasfitters, plumbers, etc., may not be engaged to work upon a building without the consent of the company.

For the use or storage of inflammable or explosive substances, such as paint and gunpowder, in an insured building, a special permit is necessary.

The policy does not cover certain enumerated articles, such as jewelry, curios, office furniture, architects' plans, etc., unless they are expressly mentioned in the policy.

What the Policy Should Include. Every policy of fire insurance should include as full and accurate a description of the property covered as possible. Personal property must be described as located at such and such a place; and if it is moved, a new policy must be taken out or the original policy extended to cover it, as the character of the building in which it is kept affects the risk very materially.

A policy made out to cover "merchandise" or "household goods" will cover such as may be acquired later as well as those which the insured owns at the time of taking out the policy.

It should also include the amount for which the insurance is taken out, the terms for which the policy is to last, the rate of premiums and at what time payable, and any other conditions which the parties wish to make a part of the agreement.

Cancellation. A fire insurance policy may be cancelled by either party upon five days' notice; a proportionate amount of the premium paid being returned to the insured when the company makes such cancellation.

Notes:

1. Everything you want included in the agreement should be put in writing and incorporated in the policy.
2. If the policy is a standard policy and the company's permission is obtained to make any changes in it, they should be in writing and made a part of the policy by a reference in it to the changes.

§ 188. Premiums

The premiums are the consideration which the person insured pays for the agreement to insure him. They are based on a certain percentage of the amount for which the property is insured and are payable periodically, generally either annually or semiannually. A failure to pay a premium when it is due causes the policy to lapse and be forfeited, but the company may consent to an extension of the time for its payment or may agree to take notes for the payment of premiums.

Notes:

1. If an extension of time is procured for the payment of a premium, it is safest to have it in writing. Make your application for the extension by letter, retain copy, and enclose postage for a reply. The company's letter will be your protection.

§ 189. The Property Insured

The property insured may be either real or personal. A policy may cover both, as for instance a dwelling house and furniture. Personal property is described by the place where it is located and a new policy must be taken out if it is moved,

as the nature of the building where it is makes considerable difference in the risk of insuring it and the rate of premium.

Insurable Interest. The party who insures a property must have what is known as an insurable interest in it. He may either own the property outright, or have some claim upon it, such as a lien or mortgage. The standard form of policy in New York provides that the insurer must be the sole and absolute owner of the property free from any claims of anyone else, but anyone who is not the sole and absolute owner may insure his interest with the company's consent.

Alienation. Any change in the ownership or possession of the property will make it necessary to take out a new policy to protect the property. This includes a sale for taxes or under a lien. The commencement of proceedings to foreclose a mortgage, or the publishing of a notice of sale under a mortgage will make the policy of no effect.

What May Be Insured. Any kind of tangible property may be insured. Deeds, bonds, shares of stock, book accounts, bank notes, promissory notes, and bills of exchange, etc., are not insurable. These merely represent an interest which the party has in some property and, if they are destroyed, the claim may be proved by witnesses without them. Money may not be insured; the Treasury will redeem what remains of it.

What May Be Insured Against. A fire insurance policy insures for damages other than those caused by actual flames. Injury due to the heat of a fire in an adjoining building would be recompensed, as would also damage caused by the means used to extinguish a fire, or damage caused by removing the goods to a place of safety even though it later developed that such moving need not have been done. To insure against damage by lightning where there was no actual ignition, a special lightning clause must be attached to the policy.

Floating Stock. A merchant may insure his stock with the understanding that it is to be replaced by other material of the

same kind. His policy would be known as a floating one, and in case of damage, he may recover on the stock on hand when the fire occurred, regardless of what stock was on hand when the policy was issued.

Coinsurance. A coinsurance clause stipulates that, in return for a reduced rate, the insured must insure his property up to a certain percentage of its value, usually 80 per cent, and if he fails in so doing he must himself bear a proportion of any loss, thus making him a coinsurer with the company of his own property.

For instance, if his property is worth $10,000, an 80 per cent coinsurance clause would obligate him to carry insurance to the amount of $8,000. If he carried only $6,000 and a loss occurs, he would be paid only such a percentage of his loss as the insurance he carried is to the amount he agreed to carry, in this case three-fourths. Therefore, if fire damaged his property to the extent of $4,000, he would receive only three-fourths of this amount, or $3,000.

Notes:

1. In changing the location of personal property always be sure to take out a new policy.
2. In buying buildings of any kind, the first thing to do is to arrange for their insurance. A person living in a house for which he is paying by instalments has an insurable interest in it.

§ 190. Warranties and False Representations

False representations are misstatements made to the company and its agents when applying for the policy, or afterwards as to any change in the condition of the property of which the company has a right to know. If such misstatements have any material effect on the policy they will render it void.

Warranties are representations which are included in the policy. They may consist in answers to a schedule of questions

which are attached to the policy and made a part of it. If any of the warranties are false the policy is of no value. Even an inaccurate statement made through an honest mistake, if it is made a part of the policy, renders it useless.

Other Insurance. Misstatements as to other insurance where the policy is of the standard form will render it of no effect whether they are warranties or mere representations. Increasing the insurance on the property increases the temptation to be careless or to have "accidental" fires, and the law is strict that the company must know of and consent to insurance on the property in any other company. Where a property is covered by policies in different companies, any one insurer is liable only for the proportion of the loss that his policy bears to the total amount of insurance.

Notes:

1. Be very careful to make only the most accurate statements in answer to any schedule of questions to be filled out in making application for the policy. If these statements are wrong, and the schedule is attached to and made a part of the policy, your policy may be of no value.

§ 191. Settlement of Losses

When a loss occurs the insured must at once notify the company and then make out an inventory of the damaged property, stating the value of each article separately. This inventory must be sworn to. The New York standard policy gives the company the option to require that it be confirmed by the certificate of a magistrate or of a notary public. In this inventory the insured must state if there are any other claims against the property; or, if it is partly owned by others, who they are and what is their interest in it, and what to the best of his knowledge was the cause of the fire.

The company usually sends out an adjuster to investigate

the loss. He must be shown all the damaged property and any papers relating to its value, or plans, specifications, etc., which would aid in determining the value of the property destroyed. The insured must be ready to submit to any examinations which the company may wish to make and to make any affidavits they may require.

If the insured and the company cannot agree on the amount necessary to cover the loss, the company and the insured each appoint one appraiser and the two go over the property and value it. They select an umpire who decides between them in case there is any dispute as to the proper valuation. Their decision settles the amount which the company is liable to pay.

Options Which the Company May Exercise. Under the standard policy in New York, the company has the right to replace or repair the property instead of paying for the loss. Or it may take the property on paying the appraised value for it. If the property is capable of being repaired, the company pays only the amount which is adjudged necessary to restore it to its former condition.

If the insured has any claims against persons other than the company for the value of the property, he must transfer them to the company when he is paid the amount adjudged proper to cover the loss, and the company may sue and collect on the other claims.

Notes:

1. It is wiser to leave property in its damaged condition after a fire until the adjuster arrives. But if there is danger of its becoming more damaged by being left, it should be removed to a place of safety. The insured should take every precaution to reduce the loss as much as possible.
2. Be sure to include everything in the inventory and to state its full value. It will be very difficult to prove any greater value afterwards.

CHAPTER XXXVI

LIFE INSURANCE

§ 192. Nature of Contract

Life insurance today is one of the most important businesses in the country. Before the invention of the mortality tables the rates were high and the business was on too uncertain a basis to be widely utilized. With its present development it has become of the greatest value as a means of saving, investing, and protecting business. Its value as a protection against a dependent old age has caused governments throughout the world to become interested in it, different forms of old age insurance being in use in various countries and among the state employees of Massachusetts.

§ 193. Insurable Interest

Like the contract of fire insurance, the contract of life insurance is a speculative one. If a person attempts to insure the life of someone other than himself, he must have an insurable interest in it, though this interest need not continue during the life of the insured nor exist at his death. One may, however, insure one's own life and make such insurance payable to a beneficiary who has no insurable interest in one's life.

An insurable interest in a human life is not easy to define. Generally the party who does the insuring must be related to the insured by such ties of blood, marriage, or contract that the death of the insured would materially injure him. A married couple have an insurable interest in each other's lives; a father has an insurable interest in the lives of his children because they might some day support him; a sister may insure her

brother for similar reasons; a partner may insure the life of his copartner; or a creditor may likewise insure the life of a debtor.

§ 194. The Parties

The parties to a life insurance policy are the person whose life is insured, or the applicant; the person for whose benefit it is insured, or the beneficiary; and the person or company insuring it.

Life insurance may be conducted either through a corporation, or through a fraternal organization, or it may be mutual. Many of the large life insurance companies are either mutualized, or are mutualizing. In a mutualized life insurance company, all excess over actual cost of insuring is later returned to the policyholders as dividends. In a stock corporation, this excess goes to the stockholders. Where a former stock company becomes mutualized, provisions are usually made by which the stockholders and policyholders are each to have a share in the dividends in proportion to what is determined to be their actual interest in the company.

Fraternal benefit insurance exists among the various masonic and other orders and in many business organizations. It is a form of mutual life insurance. When a benefit falls due, it is raised by assessment on the members in proportion to their rights to benefit by the fund, or else a fund is raised by assessment and kept on hand to meet the benefits as they become due.

§ 195. The Policy

Policies are of various forms. In participation policies, the accumulated surplus in any year is divided among the policies and the share of each is credited to it, to be paid over when the policy becomes due.

In non-forfeitable or incontestable policies, the company

agrees that after a certain period of time the policy shall not be forfeited for any cause except non-payment of premiums. Courts will usually enforce this agreement. Of course, if the beneficiary has no insurable interest, the contract would have been illegal from the first and could not be enforced.

Policies may be whole life, that is, the premiums continue to be payable until the death of the person whose life is insured. If the policy is a participating one, the dividends may either be applied to reduction of the premiums, or may be accumulated, as the holder prefers.

Another form of policy is limited payment life. The premiums on this class of policy are so divided as to be payable within a limited number of years. After this the policy becomes a paid-up policy and is payable on the death of the person whose life was insured.

There are also endowment policies and term policies. The endowment policy is perhaps the most common form of policy. Under it, the amount is payable either at the end of a fixed term of years, or upon death in case of death before the expiration of that period. This policy operates both as an investment and a protection. At the end of the term the insured may, as a general rule, exercise his option to take out a paid-up policy and leave the money invested.

Term insurance is like endowment insurance except that it does not allow any accumulations, nor permit the holder to take out a paid-up policy at the end of the term.

Many liberal forms of policies are now in use.

Application and Examination. If the company does not consider the life a good risk, it has a right to reject the application. The applicant is required to answer questions on an application blank and to submit to a medical examination. As the application blank is made a part of the policy, any statements on it amount to warranties, and the policy will be of no value if any of them are false. If, otherwise than on the blank,

the insured makes any false representations which have any effect on the risk or the insurance, the policy is void.

Notes:

1. A policy of life insurance should always be carefully read to make sure that the kind asked for has been issued. It is well to examine closely various forms and find out the advantages they offer before insuring. The laws of some states give more security to the insured than others.
2. Fraternal insurance has failed in many cases, because new members ceased joining and those remaining could not pay the increased assessment.
3. To cheat the company by answering questions on an application blank falsely is useless. The policy will be worthless when the insurance is needed.

§ 196. Premium Rates

The premium rates in life insurance are worked out by means of the mortality tables. These are tables based on an examination of statistics, giving the probable length of life at certain ages. Accordingly a young person can take out insurance at a smaller premium rate than a middle-aged person, the rate increasing as one grows older.

If these premiums are not paid when they are due the policy becomes forfeited; but the company must give notice to the person whose life is insured, or to the assignee if the policy has been assigned, and notice to him again each time a premium becomes due. The company may extend the time of payment or take a note for the amount.

In fraternal insurance the members of the association are usually not charged premiums but are assessed on the basis of their interest in the common fund. Sometimes these assessments are made from time to time and a fund accumulated;

more frequently they are made when some member dies and his family become entitled to the benefit.

Notes:

1. It is much cheaper to take out insurance early in life.

§ 197. Agents

Life insurance agents, as well as fire insurance agents, must procure a license from the state department in charge of insurance. In New York these licenses have to be renewed every year. (See Part IV on general subject of agency.)

§ 198. Right to Change Beneficiary

Unless there is a clause in the policy reserving the right to change the beneficiary, no change can be made without his consent in writing. The beneficiary has a vested right in the policy—one which he can himself transfer to someone else. In some states, even in the case of his death, the profits of the policy will go to his estate and no one else can be named.

The beneficiary cannot be changed without his consent if the insured has taken out the policy under an agreement with him, or if the beneficiary has paid any of the premiums.

The consent of the company must always be obtained to any change of beneficiary. This consent must be in writing.

Notes:

1. The policy should always contain a clause permitting a change in the beneficiary. If such a change is not provided for, anyone taking the policy as security must get the written consent of the beneficiary to the arrangement.

§ 199. Assignment of Policy

A policy of life insurance may be assigned if it permits a change of beneficiary. The company must be notified of this assignment.

§ 200. Settlement of Losses

When he makes his claim for the proceeds of the policy, the beneficiary must send with it a proof of death filled out on one of the company's forms and certified to by a physician.

Where there has been a change of beneficiaries or the policy has been used as security, there may be conflicting claims for the proceeds. If the various claimants can agree among themselves, the company will generally pay the loss to those who are admitted to be entitled to it, upon receiving releases from all the claimants. If there is a dispute which cannot be settled otherwise, it usually has to be decided in court.

The company will resist the payment of claims if there was any fraud in the procuring of the policy or if misrepresentations as to the health of the insured come to its knowledge. In one case known to the writer, the beneficiary in the proof of death made a statement as to the age of the insured person which differed from that made in the policy. The company discovered that there had been a misrepresentation and resisted the payment of the claim.

Suicide, unless committed within a year from the time the policy was taken out, does not generally excuse the company from payment. Many policies provide that if the insured is killed while engaged in the commission of crime or executed as a punishment for crime, the policy will not be payable. The death must be the result of the crime in order to render the policy void. Dying of apoplexy while attempting to hold up a train would not excuse payment.

Most American life insurance companies have heretofore imposed no limitation in their policies on the right of the insured to enter military service.[1] It is probable that hereafter it will be the rule in such cases to stipulate that a higher

[1] Eleven of the great life insurance companies on April 10, 1917 announced new rates on policies containing war clauses. In most cases no extra premiums are demanded for military service within continental United States. For service abroad, all payments are suspended unless the holders agree to pay extra premiums amounting to an average of 10% of the face value of the policy. (Business Digest, May, 1917.)

premium rate be paid or that the company be allowed to diminish the proceeds payable in event of death.

Special insurance for soldiers and sailors at moderate premiums has been provided by the government. The annual rate for $10,000 insurance is approximately $80 per annum.

Notes:

1. In order to make sure that the proceeds of a policy will go to the person whom the insured intends to benefit, without an expensive lawsuit, it is wisest, when making any change in a policy, to get a written release from any party who may be affected by the change, and keep it attached to the policy.

CHAPTER XXXVII

SUNDRY INSURANCE CONTRACTS

§ 201. Enumeration

In addition to fire and life insurance, there are sundry other insurance contracts, such as marine, accident, liability, casualty, burglary, plate glass, boiler, tornado, fidelity, rent, title, burial, live stock, hail insurance, etc.

In all of these the policies call for certain representations, which must be truthful; and proofs of loss must be made out and, as a usual rule, sworn to, when payment of a loss is claimed.

§ 202. Marine Insurance

This is the oldest form of insurance, older than either fire or life insurance. It originated in Lloyd's Coffee House in London, and the policy is known as Lloyds. The policies were passed around and everybody took a share in the risk. In case of loss they were assessed in proportion to their subscriptions to pay the loss. These subscribers were called underwriters. The business is handled by regular incorporated companies today. Its object is to protect the insured against losses on a vessel at sea. Marine policies may also be taken out on ships traveling in any navigable waters.

The policy covers losses by fire, various forms of shipwreck, including losses incurred in trying to avert shipwreck, and losses from piracy. The insured is by custom held to be duty bound to give the insurer all information in his power with regard to the ship, the voyage, the cargo, or anything else that might affect the risk. If he conceals anything or makes any false representations, the policy will not take effect.

The person taking out marine insurance always warrants that his vessel is seaworthy; or that the goods insured were in good condition when taken on board. If either statement is untrue, the insurer will not be liable.

In a marine policy, the amount payable in case of loss is fixed by the policy. Marine policies also cover what is known as general average.

§ 203. General Average

From the earliest times, it has been the custom, where goods were thrown overboard at sea to save the vessel, for the other owners of merchandise on board and the owners of the vessel to contribute to make good the loss. The underwriter, as the insurer is called in a marine policy, takes upon himself the responsibility of collecting this contribution. Particular average means actual insurance on the particular thing insured and is paid by the insurance company.

Proofs of loss, giving full particulars of the nature, amount, and cause of the damage must be made out and sworn to by the master and crew of the vessel; and then an investigation is made either by some government surveyor of the port, or by experts chosen by the parties to the contract. In the event of a dispute as to the amount of the damage, the damaged goods are sold at auction and the amount determined in that way. The insured must show bills of lading or other documents to prove his ownership of damaged goods, and the policy cannot be assigned without the underwriter's consent.

In the American Lloyds policies it is provided that if there is any prior insurance on the vessel the underwriters shall be liable on that policy only to the extent that the prior policies do not cover the loss.

Notes:

1. Anyone taking out a marine policy should be careful to note just what dangers it protects against,

especially what provision it makes in case of war. In the Lloyds policy it is necessary to make a special arrangement as the ordinary policy expressly releases the insurer from damages arising from the perils of war.

§ 204. Accident Insurance

Accident insurance is insurance against injury or death by accident. The policy may cover injury only, or it may also provide for a payment to a beneficiary in case of the death of the insured by any accident. The proceeds are payable to the person himself in case of injury. These policies do not cover mere illness, but such things as ivy poisoning, etc., which are regarded as accidents, are included.

Sometimes there is a dispute as to what constitutes an accidental injury. Thus, although infected water might be drunk through accident and serious illness result, one could not collect an indemnity; whereas one could collect on injuries due to mistakenly taking poison for medicine, inhaling gas, etc.

Many companies will not pay if the insured exposed himself to unnecessary risk such as jumping on a moving street car; nor will they pay for injuries received while intoxicated, though in this regard there is sometimes great difficulty in deciding if a person's intoxication were such as to make him more liable to injury, and if it were not they would have to pay.

All accident policies provide lump sum indemnities for such injuries as the loss of a hand, etc.

§ 205. Health Insurance

Some companies insure against sickness and ill health. Usually these policies name a list of diseases in event of which a weekly indemnity is granted. In some cases the health insurance is allowed only in conjunction with accident insur-

ance. Some of the fraternal orders allow their members sick benefits which are the equivalent of health insurance. Practical difficulties in administering the business of insuring against sickness have limited its development. A savings account is probably the best provision against ill health.

§ 206. Group Insurance

Group insurance is a plan to insure all employees of one employer offering an eligible group, where conditions permit, without individual medical examination, under one blanket contract issued to the employer.

The premiums for this insurance are paid monthly by the employer and the insurance is payable to the beneficiary named by the employee. Ordinarily the basis of insurance is one year's salary with a maximum of $3,000 to any individual. Any employee receiving annual remuneration in excess of that sum would receive up to $3,000 insurance.

If desired by the employer, the insurance company will settle the insurance benefits in twelve monthly payments. This would amount to a continuance of the pay check for a full year in the event of death while in service—during which time the beneficiaries would be able to adjust themselves to the changed conditions caused by the death of the breadwinner.

The operation of the plan is simple. New incoming employees are automatically included upon passing a simple health test and the insurance by the employer on outgoing employees ceases upon termination of service.

The cost depends on the age and annual wage of each employee. It would be approximately 1¼ per cent to 1½ per cent of the annual pay-roll.

§ 207. Liability Insurance

Liability insurance is to protect the employer from liabilities arising under the Employers' Liability or Workmen's

Compensation Acts. (See §§ 233, 234.) In many states it is possible to take out this form of insurance with a state fund. There is also automobile liability insurance, which covers liability for injuries to others resulting from the use of the automobile. Railroad companies may take out insurance (carriers' liability insurance) to protect them against liability to passengers and others, for injuries arising from railroad accidents.

§ 208. Burglary Insurance

This is one form of what is known as casualty insurance, that is, insurance against accidents to property of various kinds other than loss by fire. It is, as the name implies, insurance against loss of property by theft. It applies only when the theft is committed by someone breaking into the house or building where the property is kept, unless the policy states otherwise. It would not cover having one's pocket picked.

§ 209. Plate Glass Insurance

This is insurance on large plate glass windows because of the great expense of replacing them. It is also a form of casualty insurance. Where the windows are injured in a fire, if there is any insurance other than the glass insurance policy on them or on the building, only an amount proportioned to the relation of that policy to the whole amount of insurance on the building can be collected on the plate glass insurance policy.

§ 210. Title Insurance

In order to protect purchasers of real estate against the expense of lawsuits arising from possible defects in the title to the property, a business of investigating and insuring the title has grown up. Title insurance companies generally furnish both title searches and insurance. As with most other

insurance of this nature, the company generally settles the claim or defends the suit on notice from the insured that he has been served with a notice of suit.

§ 211. Sundry Insurance Contracts

Automobile Insurance. Many companies offer automobile insurance. What is known as a full cover on an automobile includes insurance against the hazards of:

1. Fire or explosion.
2. Transportation, i.e., derailment and collision.
3. Theft.
4. Damage by fire to personal effects carried upon the car.
5. Damage to other property by being in collision with the automobile insured—known as property damage.
6. Damage to the automobile insured by being in collision with some other object.
7. Loss of life or injury to the occupants of the car and legal liability for expenses in connection therewith.
8. Loss of life or injury to others and legal liability for expenses in connection therewith.

The rates are high to compensate for the very considerable risks. What is known as the "moral hazard," i.e., the risk of unfair dealing by owners, is great, and hard to guard against. The enumeration of hazards shows the varied possibilities of loss and damage.

Boiler Insurance. This is insurance against injuries to property arising from boiler explosions, another form of casualty insurance. A fire insurance policy does not cover such losses unless the explosion resulted from a fire.

Fidelity Insurance. Fidelity insurance is insurance against losses arising from fraud or dishonesty on the part of agents.

Credit Insurance. Credit insurance is insurance against the dishonesty of debtors.

Tornado Insurance. As its name indicates, this is insurance against damages and loss of property arising from tornadoes.

Burial Insurance. This form of insurance is in operation among the very poor. In return for certain weekly or monthly payments, the company guarantees to pay the expenses of a decent burial.

Rent Insurance. This is insurance for the loss of rents owing to the failure of tenants to pay rent, or to a destruction of the property by fire or some other calamity.

Strike Insurance. An employer can even insure himself against strikes on the part of his employees, and the consequent losses.

Part VII—Employment

CHAPTER XXXVIII

THE CONTRACT OF EMPLOYMENT[1]

§ 212. Introduction

The contract of employment is perhaps the one which most concerns the ordinary man in his everyday affairs. All the relationships between employers and employees are governed by contract and the laws regulating the subject. In recent years, these laws have undergone almost a revolution; and they are still being rapidly changed to meet modern ideas of what such relationships should be, and a new sense of the obligations which the employer owes to those under him. It is most important for everyone to know exactly what these changes in the law are, and how they may affect him individually.

The Federal Employers' Liability Act, which defines the rights of all employees engaged in the business of interstate commerce, has been followed in many of the states by acts of like tenor; and various efforts have been made to introduce some of the schemes for workmen's compensation and old age pensions from abroad. Both of these plans have already been adopted in some of the states; and, it would appear from the trend of modern legislation, they are likely in the near future to be enacted into some form of law in most states of the Union.

Too much importance cannot therefore be given to the contents of this particular chapter. For this reason the subject of

[1] For forms of contract of employment, see Chapter LXXXV, Forms 35-38.

the relations of employer and employee has been treated with some fullness of detail.

§ 213. Definition

A contract of employment is a contract for the performance of services by the terms of which the employer is to direct how the work is to be done and what results are to be accomplished. This personal direction by the employer is the essential feature. A contract with a tailor for a suit of clothes is not a contract of employment because it lacks the element of personal supervision.

The usual elements of a contract must be present. Competent parties must agree on the terms; the subject matter is personal services; the consideration is the wages or salary to be paid.

Wages are payable by the day, the week, or the month where the contract expressly provides that they shall be, or where it is the custom to pay in that way, so that the parties might be supposed to have intended to make it part of their agreement. If there were no such custom and the contract said nothing about it, the employee would not be entitled to his wages until the end of the entire period for which the contract was to run.

The custom of paying wages at short periods, by the week or month for example, is pretty well established. If the parties desire to arrange otherwise, it should be so stated in the contract.

§ 214. What Constitutes a Contract of Employment

There must be an agreement by competent parties. One party agrees to perform services for the other. There must be a consideration. One party gives his services in return for the payment of wages or salary by the other party.

A contract to do work on shares is an agreement by one

party to perform some labor, such as raising a crop in return for half the crop. For instance, a man may agree to cut grass for a land owner for half of the grass. Such contracts are common in farming communities. The fact that the wages are paid otherwise than in money does not alter the relationship.

As has been stated (§ 213), the peculiar and distinguishing element of the contract of employment is that the party for whom the services are to be performed has the right to direct the other party in what he is to do. A contract to build a house where the builder merely agrees to construct a house according to certain plans to be furnished by an architect and to the satisfaction of the person for whom he is building it, is not a contract of employment. But where a man agrees to do the manual work of building the house under another's orders as to how it shall be done, he is that man's employee.

The essential element of the relation of employer and employee is the right of the employer to give orders to and direct the employee in the performance of his work.

Most of the work on public buildings, roads, canals, etc., is done by letting the entire contract to a contractor who in turn lets out parts of it to subcontractors. The question of the liability of the main contractor to the employees of his subcontractors rests on this principle. If the employees are taking orders from his foremen, the chief contractor is liable to them as he would be to his own employees (see § 225). If the subcontractors are to do their own directing and give the orders to their own men, being responsible to the main contractor only for the finished results of the work, then he is not liable to their workmen any more than he would be to outsiders.

§ 215. Independent Contractors

Independent contractors are not employees. An independent contractor is a man who engages with another to hand

over to him in completed form some particular piece of work, and to receive a certain sum of money for doing it. In building, the excavating, the mason work, the plumbing, and painting are usually undertaken by such independent contractors.

Where a contractor merely engages to do a piece of work for another and retains the right to direct its doing himself through his own foremen, his employees do not ordinarily stand in the relation of employees to the person with whom he has contracted. Sometimes, however, the law says they shall have the rights of employees, and then they may claim them. Most of the state enactments as to employers' liability and workmen's compensation give employees of independent contractors the same rights against the principal contractor that his own workmen have.

§ 216. An Express Contract Cannot Be Proved by Custom

In attempting to prove an express contract of employment, it is not enough to show the usual custom of a mercantile house or other business in making such contracts. The house is entitled to make a separate contract with every employee; the duties and rights of each employee are regulated by that contract without regard to dealings with other employees.

For instance, in an Alabama case an employee claimed that there was a custom in the firm to engage employees by the year, and that therefore his employment with them was for the year. The court said that he must prove the actual agreement between himself and the firm.[2]

Sometimes provisions may be read into a contract from customs which are universally known in the line of business in which the contract of employment was made. For instance, if there was a universal custom to pay employees by the week, the court might find from the testimony that both parties had it in mind at the time of the making of the contract. In order

[2] Hartsell v. Masterman, 132 Ala. 275; 31 So. 616.

to prove this to be the fact, however, the custom must be so universal that everybody in the business ought to know of it, and either party may prove that they expressly agreed otherwise.

Notes:

1. You cannot rely on custom in making a contract. All provisions of the contract should be stated expressly.

§ 217. Interpretation of Contract

The contract of employment is to be interpreted in the light of what both parties reasonably understood it to mean. The same rules that apply to contracts in general govern this type of contract. (See § 50.) In case the provisions are indefinite, the question as to when it will be understood to begin and to end is answered in §§ 219, 220.

Any well-recognized customs in the particular trade or business to which the contract under consideration relates, such as a custom of paying a certain percentage as commission to insurance agents, etc., will be considered in seeking to find the meaning of the contract.

§ 218. Modification of Contract

The contract of employment, like every other contract, may be altered by the consent of all the parties to it. The question of whether there must be consideration or not, or what constitutes consideration for the new contract, has already been taken up under the subject of contracts in general. (See § 49.)

§ 219. When Contract Begins

Where the contract does not state when it is to begin, it begins at once, or as soon as is reasonable under the circumstances. For instance, if a man is employed to act as bookkeeper for a business which has not yet been started, he will

not be expected to begin his work or draw his salary until the business starts.

Notes:

1. Both parties should see that the time when the employment is to begin is made part of the contract.

§ 220. Duration of Contract

Where there is no definite time fixed for the contract to end, it will end when either party desires to terminate it. If a definite time is fixed for the payment of wages, such as a day, a week, or a month, the contract will last for at least that period of time, and cannot be terminated before then. If the employment is by the week, month, or year, it cannot be terminated by either party except at the termination of such period. If the employer discharges the employee (except for good cause) before the end of such a period, he will be liable to pay the employee until the end of the period.

If the employee leaves in the period, he will strictly forfeit all claim for compensation. Some courts allow in such cases whatever value the employee can show for his services, less any damage caused by his leaving before his time was up.

Notes:

1. A definite understanding as to the duration of the employment is better for both employer and employee. It will avoid unpleasant disputes and may save a lawsuit.
2. Both employer and employee should act fairly about terminating the employment. To leave without notice at end of period or to discharge without notice at end of period is in most cases unfair.

§ 221. Termination of Contract

A contract of employment may end either when it is completed, or when it is broken by either of the parties to it.

What the Employee May Do. On the part of the employee, the contract may be broken either by leaving the employment or by doing something which would justify his employer in discharging him—by acts of disobedience or insubordination, or by acting contrary to his employer's interests.

The disobedience or insubordination must be such as will prevent the employer from being able to rely on the employee to do good work. And the employee is under no obligation to obey an order to do anything not called for by his contract. A department store owner discharged the head of his dressmaking department because she refused to obey his orders to perform the work of a seamstress. The court held the discharge a breach of contract.

Either incompetence or habitual drunkenness constitutes a breach of the contract. The employee undertakes to be only reasonably competent, however, and he cannot be discharged for not being an expert, unless there is some express understanding calling for a specified degree of skill.

An illness of the employee which keeps him from work also puts an end to the contract, though it may hardly be regarded as a breach.

What the Employer May Do. The employer may break the contract either by discharging the employee without justification, or by rendering the work in some way unsafe to his health, his life, or his morals. Or he may break it by requiring the employee to work for less wages than were agreed upon, or to perform different services. He can make none of these requirements without the employee's consent.

A contract of employment is one involving personal relations and cannot be assigned by either of the contracting parties. Therefore, if the employer sells out his business to other parties, his employees cannot be compelled to work for the new owner. If the employer takes a partner and forms a new firm, or if a firm becomes incorporated, the result, so

far as the employees are concerned, is similar to assignment of the contract to a third party.

The bankruptcy or insolvency of the employer or the winding up of his affairs by a public officer, as in the case of a bank or an insurance company in danger of insolvency, puts an end to the contract.

The fact that an employer has no work for an employee will not justify a discharge before the end of the contract.

Notes:

1. In selling out a business, or changing the nature of a business, an announcement of the new arrangement should always be made to the employees. Remaining in the employment with knowledge of the change amounts to an acceptance of the arrangement.

§ 222. Rights and Remedies

In any case, except where the employee has been guilty of actual disloyalty to his employer by engaging in competition with him, or has offered physical violence to his employer, he is entitled to the wages, salary, or commissions which he has already earned, and, if a bonus has been declared, he is entitled to that too. This is true whether the breach of the contract is due to his own action or to that of his employer. (See also § 227.)

Employee's Rights to Damages. Where the employer is guilty of a breach of the contract, the employee is entitled to damages. He may sue at once and collect what is already due him, or he may wait until the contract period is over and then sue for the total damages he has sustained. It is his duty to try to obtain other employment, and the damages which he may recover are limited to the difference between the wages he would have received and any sums which he has been able to earn since.

Where the wages or salary are to be paid at stated periods, the courts in some states allow the employee to sue at the end of each period for the amount then due him; as for instance, where the wages are payable by the month, at the end of each month. In other states the employee may bring only one action, and if he sues before the end of the contract period he may recover only such damages as he has suffered up to that time, and will have no further remedy.

Where a contract of employment provides for notice on both sides, the employer must give the required notice or pay the employee wages for the period of notice before discharging him; and if he fails to do this the employee is entitled to recover this amount as damages.

Employer's Grounds for Damages. If the employee breaks the contract, the employer is entitled to recover any damages he can prove. He must prove that it is impossible for him to procure anyone to do the work in the employee's place. He cannot recover any damages if the employee leaves his employment because of illness. He will be entitled to retain wages equal to the amount of notice the employee is required to give, in case there was such a provision in the contract.

References. The employee has no legal right to a reference. But nowadays the custom of giving references has become in some places so universal that it almost amounts to an understood part of the contract.

Notes:

1. Contracts providing for notice should specify a definite time and a definite amount of wages to be forfeited on the part of the employee for failure to give notice.

§ 223. Employment After Expiration of Contract

Where the contract sets a definite time for its termination, and the employee continues in the employment after that time

without any new understanding, the general rule is that, if the work which he is doing is the same, he is supposed to have been employed on the same terms.

The new contract in such case will be for the same time as the old. For instance, if a workman hired for a year remains in his employment into the second year without any new agreement, it will be presumed that he was working under an agreement for another year; and it will be a breach of the contract for which the employer will be liable in damages if he discharges the workman before the end of this time. The employer, however, may, if he can, show facts to prove that there was no such understanding.

Notes:

1. In this case again, it is safer to have a definite understanding about any renewal of the contract.

CHAPTER XXXIX

RELATIONS OF PARTIES

§ 224. Duties of Employee to Employer

The employee by entering into the contract of employment represents himself to be reasonably competent for his work. If the work is manual labor, he is not required to have any experience and must be given a reasonable time to learn its duties. Where the work requires skilled labor, such as in handling machinery, etc., the employee is required to be reasonably and ordinarily competent. If any high degree of skill is required, it must be stipulated in the contract.

A case is on record where a baseball club engaged a pitcher without any definite requirements expressed in the contract; and when they tried to discharge him because he did not come up to what they expected of him, the court made them pay damages, because it could not be proved that he could not pitch as well as the average professional player.[1]

There may be a provision in the contract that the employee must be satisfactory to the employer. In most states even then the employer will have to show good reasons for his dissatisfaction before he may discharge his employee.

Loyalty and Obedience. Other duties which the employee owes his employer are those of loyalty and obedience. He must not do anything which may injure his employer's business, and has no right to engage in any employment which is in competition with it. Otherwise, the employee has a right to use his spare time as he likes, unless he has agreed by the contract to devote his entire time and attention to the business.

[1] Baltimore Baseball Club v. Pickett, 78 Md. 377; 28 Atl. 279; 44 Am. St. Rep. 304; 22 L. R. A. 690.

Sometimes even in such a case it has been held that the employee has a right to do something else which does not injure his employer where the employer fails to furnish him with work. In the California case of Stone v. Bancroft,[2] Stone, a publisher who had been employed by Bancroft to devote his entire time to publishing the historian's works, did some work on a medical book while he was waiting for Bancroft to furnish him the manuscript. The court held that Bancroft could not complain, since he had given no work to the publisher. Bancroft was, of course, liable to pay him at the contract rate for the entire period of the engagement.

Part of the employee's duty of fidelity to his employer consists in keeping to himself any business matters of a confidential nature. Law clerks are privileged from testifying on the witness stand to any confidential communications from clients; and if an employee discloses any secret processes—what are known as "trade secrets"—he is liable to his employer for damages.

Liability of Employer in Using Force. The duty of obedience cannot be enforced by the use of violence on the part of the employer. Formerly a master was allowed to chastise his apprentice on the ground that he stood *in loco parentis* (in the place of a parent) to him. But there is no justification for an employer laying his hands on his employee nowadays, and he would be liable to an action for assault and battery if he did so.

The courts themselves will not compel an employee to work if he refuses. If the employer can prove that he has suffered by the breach of the contract, the employee is liable to the employer in damages, but there is no way of forcing an unwilling employee to work.

Inventions. The patent rights to inventions which the employee makes in the course of his work belong to him and

[2] 139 Cal. 78 Pac. 1017; 72 Pac. 717.

not to his employer, but it is probable that he would have to give the employer a right to make use of the invention. It is common nowadays for employers to make some provision in the contract of employment for taking over inventions made by their employees.

The employee must perform the services stipulated for in the contract. It is not his fault, however, if their value to the employer is destroyed by the act of some third person, and the employer is none the less bound to pay him the wages agreed upon for them. For instance, in a certain Alabama case one Parham employed a man named Tucker to go into Mississippi and get back some slaves for him. Tucker got them back and they were immediately attached by a creditor. Tucker had nevertheless fulfilled his contract.[3]

Notes:

1. If the employer wishes anything more than ordinary skill from his employee, he must include the requirement in the contract.
2. If the employer wishes to make any arrangement about inventions, he should come to an agreement with his employee and have that included in the contract.

§ 225. Duties of Employer to Employee

The employer owes it to his employees to provide a safe, healthful, and suitable place to work in, and proper tools to work with. To do this, he must arrange for proper inspection to see that things are in the proper condition and remain so. And it is his duty to hire competent fellow-employees. An employee is not required to expose himself to the danger of working with drunken, reckless, or incompetent associates.

Responsibility of Employer. These duties of the employer cannot be shirked. He is always responsible for failure to

[3] Wolfe v. Parham, 18 Ala. 441.

perform them, no matter whom he appoints to attend to them. He must keep buildings, etc., in proper repair, examine machinery to see that there are no dangerous defects in it, and inspect everything that comes to him from any other person to see that it is in safe condition before giving it to his employees to work with.

Co-operation of Employees with Employers. The law is reasonable. The employer is not responsible for an injury arising from an unknown defect, if he has used reasonable and proper inspection. He cannot be required to be continually inspecting; therefore it is the duty of employees to inform the employer of any defects which they notice. If they do not, and suffer injuries, they must usually take the consequences; but at the same time the employer is in a better position to be aware of defects than the employee, and where the defect is a hidden one, it is the employer's and not the employee's business to discover it.

It might be well to state that there are many regulations (hours, sanitation, etc.) which the statutes of each state require, and that often it is required to post a copy of the law on the walls of store or factory. (See also §§ 233, 234, on employers' liability and workmen's compensation acts.)

Limits of Liability. The employer will not be liable for the consequences of defects which nobody could have foreseen and prevented, such as the flying off of slivers of steel from crystallization, a defect which cannot be discovered without a chemical test and the breaking up of the steel in order to perform it. And he is not obliged to employ experts specially to make chemical and other scientific tests. He is required to make only the ordinary tests employed by those engaged in that occupation.

If an employee is competent when hired and afterwards becomes reckless, drunken, or incompetent, and his acts take place without the knowledge of the foremen or superinten-

dents, though these exercise reasonable supervision, the employer cannot be made liable for the consequences of such acts.

Provision for Work. The employer must provide enough tools and employees to perform the work with safety to all. And he must make proper rules for the conduct of the work and see that they are carried out. Where the law requires safety appliances, seats for women, etc., the employer must comply with it; but in the absence of any statute on the subject he is not required to use the latest and best appliances if those which he has are such as are in ordinary use and are reasonably safe.

Instruction of Employees. It is his duty to instruct young and inexperienced employees in the proper way to make use of tools and machinery, and to warn them of its dangers. He is not responsible if his employees disobey his orders and are injured in consequence; but if their disobedience has been going on for some time, so that it ought to have been known to the foremen and others in charge if they had been reasonably diligent in their duties, or if it has been going on with their knowledge and consent, the employer will be considered to have consented to it and will be responsible for resulting injuries as though the rules had never been made.

If he allows young and inexperienced employees to work in places which tempt them to take risks, it has been held that he will be responsible for any injuries they may suffer in consequence. A case illustrating this point was that of a young boy set to work turning a wheel near the log carriage in a saw mill. The court said that it was tempting him to follow his natural instincts to ride up and down on the log carriage, and that the employer was responsible for injuries for putting him in such a place.[4]

Employees Must Take Reasonable Care. After the employer has seen to the furnishing of sufficient and proper

[4] Marbury Lumber Co. v. Westbrook, 121 Ala. 179; 25 So. 793; 77 Am. St. Rep. 17.

tools and a safe place to work, he is not responsible if the workmen themselves misuse them. When unfinished appliances, such as molds furnished in two or more parts to be put together, or lumber furnished for making a scaffold, are given to the workmen to be put together, if the men do the work improperly the injuries are not the employer's fault. But a permanent scaffold, such as those which are used to hold up steel framework until it is entirely finished, is part of the place to work. The employer would be responsible for its safety and to any workman other than those who erected the scaffold.

Where the workmen furnish tools and appliances, the employer is not responsible for the condition of such tools, nor for accidents which may result from using them.

Necessity for Inspection. Where the work is construction work, so that the workmen are constantly altering it themselves, the employer is liable only for proper and reasonable inspection from time to time, and not for accidents that occur from some alteration the men have made themselves. But when men are working in a position of danger where they cannot be at the same time on the lookout for the danger and engaged in work, someone must be stationed to warn them. And, in the case of railway work, where there are low bridges which are dangerous to brakemen who must ride on top of freight cars in order to look after the brakes, some system of "tell-tales" or signals to warn them to stoop and avoid danger is necessary.

Further Liabilities of Employers. Employees are entitled to all of this protection not merely while they are at work, but also while they are coming to or going from their work over the employer's premises. Where a railroad company runs its trains over tracks belonging to another company, and an employee is injured in an accident due to defects in the track, the company is nevertheless liable to the employee. It

is as much its business to inspect and see that the tracks over which it requires its employees to pass are in good condition, as it is for it to inspect cars which it receives from another company to see that they are in good condition before allowing the employees to handle them.

If an employee of the company which owned the tracks were injured by any carelessness in running the train, however, the company that owned the train and not his own company would be liable to him for his injuries. His own company could have no control over the other company's trains, while the other company would have control over the tracks, if it rented them.

Special Contracts. It is not safe to rely on special contracts relieving the employer from liability. They are generally contrary to some special statute, such as the Workmen's Compensation Act, for instance, or else will be held contrary to public policy.

Notes:

1. The careful employer makes use of all the safeguards possible for his employees, not merely as a matter of humanity, but as the cheapest policy in the end.
2. The theory of the law in the matter is excellent. The practice in many cases is bad. The workman is not usually able to enforce the law against his employer and loses his job if he does.

§ 226. Presumption with Regard to Joint Owners

When a party is hired to work in an enterprise in which two or more parties are jointly interested, the presumption is that he is the employee of both, and may hold either or both liable for the duties owed to him by an employer.

In one case, an employee was hired by Rumsey, one of the joint owners, to work on a steamboat, and received all

his instructions from him. McMahon, the other joint owner, never came on the boat nor had any relations with the employee. But the court held him liable for damages for injuries to Davidson, the employee.[5]

§ 227. Wages

Wages are the compensation which the employee receives for his services. He may be paid in the form of a salary, or a fixed wage, or "by the piece"; that is, the employee may be paid a certain fixed amount per dozen, etc., for the work he turns out. He may be paid in the form of commissions, or a certain per cent of the price of goods sold, or of the amount of an insurance policy, etc. The amount of wages is determined by the agreement.

Where the wages, or part of the wages, consist of net profits, the amount of the employee's salary must not be deducted from the gross profits in computing them. Nor may interest on temporary loans be deducted. The employer cannot take out for himself interest on his investment, before computing the net profits.[6]

Wages must be distinguished from a bonus. A bonus is really a gift made by the employer to the employee. He may give it in the form of a reward for good work or may divide a certain percentage of the profits among the employees at Christmas; but in either case it is merely a gift and not anything which the employee has earned under his contract of employment. If the bonus was specified in the contract of employment, so that when earned the employee could bring suit for it, it would be a misnomer to call it a bonus. It would be earned compensation.

The employee is entitled to the wages which he has already earned even though his employer discharges him for good

[5] McMahon v. Davidson, 12 Minn. 357.
[6] Morrow v. Murphy, 120 Mich. 204; 79 N. W. 193; 80 N. W. 255.

cause, unless he was guilty of bad faith and attempted to injure his employer's business or used physical violence against his employer. A superintendent who had attempted to sell blooded cattle belonging to his employer for less than they were worth was refused the right to recover unpaid wages.[7]

Some states provide by law that wages must be paid in cash and make it a criminal offense to attempt to pay in orders on the company's store or merchandise. But even under such laws, the custom of issuing time checks which are redeemable in money, where the pay-days are put at reasonable intervals and not made purposely inconvenient to force the laborers to accept time checks, is permissible.

Distinction Between Wages and Salaries. These laws are generally made for the benefit of laborers and do not apply to clerical workers who draw salaries as distinguished from wages. In the same way, the wage-earners, but not the salary-earners, are given in most states the right to collect their wages through enforcing a lien on the employer's property.

The distinction is made in regard to labor as opposed to any other sort. Typesetters and printers come under the head of manual labor; bookkeepers and proofreaders do not.

Overtime. The law regulating the hours of labor gives the employer no right to overtime on the part of the workman unless it expressly says so. Generally, it is absolutely forbidden to allow employees on public works to work more than the time specified, i.e., eight hours a day in New York, and private employees may refuse to work for a longer time. If employees work overtime without an express agreement for additional wages, they are not entitled to them, and if the employer permits them to work less than the specified number of hours in any day, he is not entitled to require them to make it up.

[7] Von Heyne v. Tomkins, 89 Minn. 77; 93 N. W. 901; 5 L. R. A. N. S. 524.

Where a contract of employment expires and the employee continues to work without any new contract, if he is performing the same kind of services as before, he will be entitled to the same wages.

Notes:

1. The agreement for wages should not be left indefinite as to hours, overtime, etc.
2. The disadvantage of the single laborer in any dispute with his employer has caused the development of the labor union and much labor legislation.
3. A minor has usually no right to his own wages, consequently an employer should not pay them to him without his father's consent, or he may find himself under an obligation to the father. The wages should be paid to the father, or his written consent to their payment to the minor obtained. In New York the statute requires the father to give notice if he claims wages.

§ 228. Fines, Deductions, etc.

Fines can be imposed only for offenses in the course of the work. In the case of Cross v. Detroit Baseball Club,[8] Cross was fined $75 for using bad language in an argument with the manager at a distance from the grounds. The court refused to allow the club to collect the fine.

Deductions of wages for leaving without giving notice must be reasonable in amount. The court has held that indefinite deductions of all wages then due are unjust, because they give the employer a chance to take advantage of his employees by withholding their wages for long periods of time.

Fines for offenses must be agreed to by the employee. They should be mentioned in the agreement of employment,

[8] 84 Mo. App. 526.

or posted up in the rules in a conspicuous place; and the employee's attention must be called to them so emphatically that he cannot say that he was ignorant of what they were. Merely posting up rules without calling them to the employees' attention is insufficient.

Notes:

1. In making an agreement that wages may be deducted if the employee leaves without giving notice, the exact amount to be deducted should always be stated. It should be a reasonable amount, as otherwise the courts may hold the agreement unfair and refuse to enforce it.
2. Where fines are to be imposed, it is best to have a printed copy of the rules imposing them made a part of the contract of employment, or given to the employees with an announcement that these are rules for fines which they should read carefully. If there is any possibility of any of the employees not being able to read, the rules should be explained.

CHAPTER XL

EMPLOYER'S RESPONSIBILITY

§ 229. Introductory

Under the common law, the employer's responsibility for injuries to his employees was reduced to a minimum. The doctrine of the "assumption of risk" held that if the defects of equipment were such that the employee could see them, he assumed all the risk by taking employment. As a man who needed work was not in a position to reject it because equipment was unsafe, the doctrine prevented a multitude of injured workmen from receiving damages. (See § 230.)

"The rule as to contributory negligence" relieved the employer from any responsibility if the workman had himself been in any way careless. Many a crippled worker was defeated in the courts by reason of this rule. (See § 231.)

"The rule as to fellow-servants" was a particularly unjust regulation. If the carelessness or negligence of a fellow workman caused the injury, the hurt man had no compensation. He did not hire the men with whom he worked, but the law held that if he chose to work with them, and they were careless or incompetent, the employer who had hired them was relieved of all responsibility. (See § 232.)

The injustice of these rules and the disadvantage of the injured workman when he tried to enforce his rights in the courts, have led to the passage of many laws designed to remedy the condition. There are two classes of these laws:

1. The employers' liability laws, which aim to define the employers' liability and to modify or remove the objectionable common law rules.

2. The workmen's compensation laws, which try to systematize the responsibility for injury and to provide something in the nature of insurance for the wounded and bereaved in the fields of industry.

These laws proceed on the theory that if a workman is injured from any cause, there is a loss that someone must stand. In such a case, it seems that the particular industry should care for those who were injured in it, and that the care for the injured should be made part of the expenses of the business, so that careless and conscienceless employers should not be allowed to shirk responsibility.

§ 230. Doctrine of Assumption of Risk

This rule of law still holds in many states where there is no workmen's compensation act, or where the workmen's compensation act does not cover all kinds of employment.

The doctrine holds that if there were dangers in the business which were sufficiently obvious for the employee to notice and recognize, he was held to have assumed the risk of accidents which might arise from them, and the employer would not be liable for his injuries. The same was true if the workman afterwards discovered dangers and remained in the employment without the employer's promising to remedy them.

If the employer assures an employee that his work involves no danger, the latter cannot be held to have assumed the risk. For instance, in Wurtemberger v. Metropolitan St. R. Co., a foreman laughed at a workman when he told him that a jack was unsafe, and said to the rest, "Here is a greenhorn, and he thinks that jack is unsafe."[1] Wurtemberger was held to have a right to damages for the injury subsequently received. (See also §§ 233, 234.)

[1] 68 Kansas 642.

§ 231. Doctrine of Contributory Negligence

This rule holds that if the carelessness of the injured employee in any way contributed to the accident which caused the injury, the employer will not be held responsible.

It makes no difference that the carelessness of the employee was unintentional or the result of a mistake. For instance, in one case, an employee thought he was walking on a side track instead of the main track and continued walking along it until a train struck him.[2] He was not permitted to recover damages.

In another case, a brakeman named Quirouet left the brakes set on a freight car. Then, instead of waiting for the caboose which had steps on it, he was injured trying to get up in order to turn off the brakes and to prevent the wheels from bursting and wrecking the train. He was not permitted to recover damages.[3]

Some states now have a doctrine of comparative negligence. Sometimes the accident was primarily due to the carelessness of the employer or to his neglect to perform the duties which he owed to the employee, but the employee's own carelessness had something to do with it. In this case the jury must determine what damages are due the employee for the injury, and then decide what relation his carelessness bore to the employer's carelessness or neglect of duty, and award him a proportionate amount of the damages. (See also §§ 233, 234.)

§ 232. The Fellow-Servant Rule

The fellow-servant rule means that the employee cannot hold his employer for damages if the injury was due to the act of a fellow-servant or a fellow-employee. This rule, with the doctrines of assumption of risk and contributory negligence, is rapidly being done away with.

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[2] Vreeland v. Chicago, etc., R. Co., 92 Iowa 279; 60 N. W. 542.
[3] Quirouet v. Ala. Great Southern R. Co., 111 Ga. 315; 36 S. E. 599.

In some states the harshness of the old law has been mitigated by the so-called superior servant rule. That is, if the fellow-employee was a superintendent or someone in a position of authority, he is not regarded as a fellow-servant and the employer is responsible for his carelessness. In some states only an employee who has the power to hire and discharge is regarded as being a superior servant; while in others, any position of authority which gives him the power to control the actions of the men is sufficient to insure his status under the superior servant rule. (See also §§ 233, 234.)

§ 233. Employers' Liability Acts

Employers' liability acts have been passed to define and increase the liability of the employer for injuries. Most of them do away with, or at least modify, some of the old rules excusing the employer from liability. The doctrine of the assumption of risk has generally been greatly modified, and the duties of the employer to guard against accident increased. In New York, for instance, the employee assumes only such risks as may still remain after the employer has taken care to discover and remedy all defects, and has complied with all laws requiring safety devices.

It is under these acts that the doctrine of comparative negligence has been introduced.

Differences in Liability Acts. In order to know just what the effect on the old rules is, it is necessary to consult the particular liability act of each state, as the acts differ somewhat. Some of the acts apply only to special classes of workmen, such as miners; while others exclude certain classes, such as farm laborers. For information in regard to this also, it will be necessary to consult the particular act in question.

As a usual rule, these acts provide that the employees of a subcontractor are to be considered as the employees of the

contractor also, for the purpose of claiming compensation for injuries under the act.

Notice of Accident—Time Limits. In order to obtain the benefits of bringing suit under the act, the employee must give his employer a notice—usually it must be written—of the time, place, and cause of the accident. The employee may either serve it on the employer personally or send it by mail to the latter's last known address. This notice must be given within a certain limited time after the happening of the accident, fixed by the act. The time varies in the different acts, and there is generally some provision allowing the employee a certain extension of time in case of mental or physical incapacity, so that he may send the notice after the incapacity has been removed. The action must be brought within a certain time from the happening of the accident, generally varying from one to two years.

Death of Employee—Cause of Action. In case of the employee's death from his injuries, these acts give a cause of action to his personal representative, i.e., executor or administrator, or to his surviving relatives, to recover damages for the injury these relatives have suffered by his death. In such a case, the executor or administrator is allowed a certain period of time after his appointment in which to give to the employer the notice mentioned above.

This right of action in case of death is distinct from the right of the employee to sue for injuries. The employee may recover damages for his injuries; his representatives may recover only damages caused to *them* by his death. But, as a sort of additional penalty to the employer, Massachusetts allows the surviving relatives to recover damages for conscious suffering endured by the employee before his death.

In order to take advantage of these acts, the rules as to notice and the time within which the action may be brought must be strictly observed. If, through failure to comply with

them, the new right of action under the act is lost, the employee still has his old action at common law for the injuries which he has suffered, provided that it has not become outlawed also by lapse of time; but his relatives in case of his death have only the action given them by the statute. If they fail to take advantage of this action, their remedy is gone. The employee would, of course, stand a much better chance of recovering if he sued under the act.

Some of these acts have been superseded by the workmen's compensation act discussed in the next section. In other states, as in New York, the workmen's compensation act applies only to certain employments, leaving the rest to come under the employers' liability act.

The Federal Employers' Liability Act. This act applies to all the railroads engaged in the business of interstate commerce throughout the country. It also applies to all railroads in the possession of the United States, such as those of the Philippines and Porto Rico, and in the District of Columbia. Where the railroads are engaged in both interstate and intrastate commerce (that is, both commerce which crosses the state lines and that which is wholly within the state), in order to take advantage of the law's provisions the employee must himself have been assisting in the business of interstate commerce at the time of the accident.

However, a railroad company in contributing to an employees' accident fund may lawfully make the condition that if the employee accepts any benefit under the fund, he thereby gives up his right to bring suit. He does not then make his choice as to whether he will accept the benefit or will bring suit, until after the injury has taken place.

Notes:

1. In attempting to claim damages under any employers' liability act, if it is proposed to bring an action, consult a reputable lawyer, who will be

able to attend to all the necessary formalities and to secure for the injured employee his proper rights whether by suit or by compromise of the claim. If you intend to sue, do not accept any benefits from insurance funds connected with the company without first consulting a lawyer.

§ 234. Workmen's Compensation Acts

With all the protections and safeguards that can be devised by science and required by law to protect the employee, there will always be certain occupations which in their very nature are dangerous to life and limb. Such are mining, building, railroading, working in atmospheres clouded by fine dust or gas fumes, etc. In the past, the loss of life and health in these industries reached alarming proportions. It has been reduced somewhat with the modern tendency to require safeguards, but the fact remains that these industries are all the time "scrapping" humanity.

Since employees injured in these occupations seldom earn wages large enough to permit them to provide for the future, the burden of taking care of them and of their dependents has fallen in a large measure on the community. It seemed more just to make the industries which caused the injuries pay the expenses than to let the burden fall on the employee or on the community as a whole.

In consequence, both here and abroad there has grown up in recent years a system known as workmen's compensation.

> It is part of good bookkeeping to carry a depreciation account to cover the wear and tear on mechanical machinery in a manufacturing business as a part of the cost of the product. The time has come when provision must be made for the wear and tear on the human machinery engaged in the industry which is quite as much a part of the cost of production as is the wear and tear on the plant. We are

accordingly getting Workmen's Compensation Laws to protect the laborer to a slight extent against accident and to provide for his family in case of death in the course of his employment.[4]

The essential feature of this system is that there is established a scale of compensation for different kinds of injuries, by which payments are usually made at regular intervals extending over some period of time. The payment must be made, as a general rule, regardless of who was to blame for the accident, except where the employee wilfully and intentionally brought the injury on himself, or where it came about as the direct result of his intoxication.

In some states, as New York, the compensation scheme applies only to particularly hazardous kinds of occupation; and the occupations to which it applies are enumerated in the act. Under the new law other non-hazardous employments may come under the compensation law voluntarily.

In other states, it applies to all occupations, or to all occupations with a few exceptions, such as farming or domestic service.

The injury must be one arising out of the employment. For instance, in a New Jersey case a workman named Hully slipped on a concrete floor while dodging away from a fellow-workman who was trying to knock his hat off. This was held not to come under the compensation act. In New Jersey the act applies to all classes of employees, including farm hands and domestic servants.

If the employee is injured on his way to or from work, while on his employer's premises, it is considered injury in the course of his employment and entitles him to compensation.

An injury received while he was disobeying orders would not entitle him to compensation. A man named Reimers who had been forbidden by his employer to make use of an auto-

[4] Samuel Untermeyer.

mobile, took it out and was injured in consequence. He was not allowed compensation.[5]

An injury caused by a third person to an employee in the regular course of his work entitles him to compensation from his employer as does any other injury in the course of the employment. For instance, in one case a superintendent was shot by a man who had been annoying a woman employee and whom he had ordered off the premises. The superintendent was entitled to compensation.

Each act contains its own schedule of compensation. Most of them follow the same general scheme. The following is the New York schedule of compensation for injuries:

> Permanent total disability shall entitle the employee to receive two-thirds of his weekly wage, while he lives.
>
> Temporary total disability shall entitle the employee to receive two-thirds of his weekly wage to an amount not exceeding $3,500.
>
> Permanent partial disability entitles the employee to receive two-thirds of his weekly wage for varying periods ranging from 60 weeks for loss of thumb to 312 weeks for loss of an arm.

In the case of death, compensation to the employee's dependent relatives is provided according to a fixed schedule. In New Jersey the scale runs as follows: For one dependent 35 per cent of wages earned until remarriage of widow or attainment of age of 18 by children. From this it increases by a sliding scale to a payment of 60 per cent of wages earned in case of six dependents. In any case, payments are not to exceed 300 weeks.

In New York the death compensation ranges from 30 to 66 2/3 per cent of wages as a maximum, and weekly pay-

[5] Reimers v. Proctor Pub. Co., 85 N. J. L. 441.

ments are to continue until dependency ceases. In other states there are other variations, but enough has been cited to give a general idea of the liberality of these laws.

Who Are Entitled to Compensation. It is generally held that in order to be an employee entitled to compensation the man must be regularly employed, and must be subject to the employer's orders as to how the work shall be done. Independent contractors and subcontractors are not employees. (See § 215.) But the employees of subcontractors may recover compensation from the main contractor as though they were his employees.

Where there is a dispute between the employer and the employee over the amount of compensation which is due under the act, most of these acts provide for arbitration. Some of the acts provide that at any time an employer may agree with his employees to appoint a standing arbitration committee which shall decide all disputes that may arise in the future.

The law usually requires the employer to report all accidents to the Compensation Commission within a certain time after their occurrence on penalty of paying a severe fine if he fails to comply.

Where one injury results from another, the first one being the result of the accident, the compensation must cover both. For instance, an employee was paralyzed in an accident and died of blood-poisoning from a bed-sore which came because he had to lie in one position all the time. His relatives were allowed compensation for his death.[6]

If the employee was not strong physically, a fact which rendered him more prone to accident, it would make no difference in his right to compensation for the injury. In a Massachusetts case, a delicate woman named Honora Madden, who was employed as a carpet sewer, brought on angina pectoris by pulling heavy carpets across the table in the course of

[6] Burn's Case, 218 Mass. 8.

her work. It was admitted that if she had been stronger the exertion would not have hurt her. She was allowed full compensation.[7]

Employer's Defenses Taken Away by the New Act. This scheme of compensation is not made compulsory, but the same effect is accomplished by taking away all of the defenses, i.e., assumption of risk (§ 230), contributory negligence (§ 231), and the fellow-servant rule (§ 231), which the employer had at common law. The result is that the employer's chances of escaping the payment of heavy damages in a suit at law are so slim that most employers prefer to take advantage of the act.

The employer comes into the scheme by taking out insurance, or giving security for the payment of claims required by the act. After he has done this, it is assumed that each of his employees has also consented to come under the scheme unless the employee at the time he enters the employment files notice to the contrary with the employer. In New Jersey, every agreement of employment is deemed to have been made under the act, unless at the time of making the contract one of the parties notifies the other in writing that he refuses to accept the agreement under the terms of the act.

Employees Cannot Give Up Right. The acts also provide that the employee cannot make an agreement giving up his right to compensation. If he makes one, it will have no binding effect on him, and he may claim the compensation just the same.

Notes:

1. Every employer of labor should inform himself as to his responsibility under the laws of his state.
2. It is cheaper for the employer to enter the compensation scheme than to take the alternative. Where the acts allow it, most employers will find it

[7] Madden's Case, 22 Mass. 487.

cheaper to insure with the State Fund or some good insurance company than to risk paying for injuries.

3. An employer should select reputable physicians and notify his employees to go to them, when the act makes him responsible for medical attendance. This will protect both himself and his employees against overcharge or malpractice.

§ 235. Third Persons

Except under the workmen's compensation acts, the employer is not responsible to his employees for the acts of third persons over whom he had no control. If a train robber were to hold up a train and shoot the engineer, the railroad company would not be responsible for the affair to either employees who were hurt or passengers who were robbed.

The employer is, on the other hand, responsible to third persons for any injuries caused to them by his employees in performing their duties. If the injury is the result of some act of the employee which has no connection with his duties as an employee, the employer is not liable. If, for example, the employee should injure the third person in a fight over some personal quarrel, or in playing a practical joke, the employer could not be held to have had any connection with the matter. (See § 119.)

Where an employer is liable to a third person for injuries caused by his employees, if the third person was careless in any way that contributed to the accident, he would be prevented from recovering damages from the employer. The contributory negligence rule (§ 231) still stands in all cases as far as third persons are concerned.

Interfering Between an Employer and Employee. If a third person, knowing that a workman is employed by another and that the term of his employment is not over, induces an

employee to leave his employer before the contract of employment has expired, the third person is responsible to the employer in damages if he acts with full knowledge of the circumstances.

If a third person induces an employee to make a contract with him after the time of his contract with his employer is up, the employer has no cause of action. Or, if the employee has broken the contract himself and then obtains employment from a third person, the employer has no rights against the third person.

If a third person succeeds in getting an employer to discharge an employee, the employee has a right of action against that person. But if the third person merely attempts to influence the employer and is unsuccessful, the employee has no ground for action.

Part VIII—Partnership

CHAPTER XLI

INTRODUCTORY

§ 236. Definition

Partnership is the result of a contract between two or more competent parties to combine their money, property, skill, or labor for the transaction of some lawful business for profit.

Essential Elements. Mere representation that parties are partners, or their passive acquiesence in such representations by others, will, *as to third parties,* be sufficient to establish partnership liabilities. To form a partnership as between the parties themselves is less simple and requires the following essential elements:

1. A contract
2. Parties competent to contract
3. Partnership capital or property
4. A community of control
5. A lawful business
6. Profit-sharing as a motive

Unless expressly stipulated otherwise, as in the case of dormant and special partners, each member of a partnership has an equal right to assist in the management of the partnership business and property, and has equal power to contract regarding it. This right may be restricted by agreement among the partners.

The business or undertaking must be lawful, and the association must have been formed for the purpose of sharing profits. An association that does not share profits is not a partnership.

Distinctive Features. The partnership relation is characterized by certain distinctive features.

1. Each partner is an agent for the others in the transaction of any business within the scope of the partnership purposes.
2. Each partner shares, either equally or in an agreed proportion, in the net profits of the business and usually in the losses also.
3. In case of insolvency each partner is personally liable for all of the firm's obligations.
4. The property, the business, firm name, good-will, and any trade-marks or other intangible possessions are firm property and form part of the common fund.
5. A partner is entitled to good faith and fair dealing from his associates, and on dissolution of the partnership may have an accounting to ascertain his interests in the business.
6. The partnership relation is a purely personal one and the partnership is terminated if any of the partners dies, retires, or sells his interest in the firm.
7. Unlike a corporation, the partnership has no entity distinct from its membership. It cannot sue nor be sued in the firm name. It cannot contract with nor bring suit against its members, nor can they bring suit against it.

§ 237. Partnerships Distinguished from Non-Partnership Organizations

Co-ownership in either land or personal property does not involve any partnership between the owners.

Associations not formed for profit are not partnerships. The many incorporated clubs, churches, societies, associations, and fraternal organizations are not partnerships and do not involve mutual agency nor partnership liability. Co-operative societies which buy goods and *distribute* them among their members are not partnerships unless formed for the purpose of making a profit. In some states business organizations designated as partnership associations are authorized by law. These are neither partnerships nor corporations, though they partake of the characteristics of both.

Contracts That Are Not Partnership Contracts. Contracts are frequently made for a share of profits as compensation for services, for the use of property, or for the loan of money. In the first two cases, if the agreement was made in good faith and not to evade the law, the contract will not be held to create a partnership. Where money is loaned, and an agreement is made in good faith to give the lender a share in the profits as compensation for its use, and he does not participate in the management of the business or hold himself out as a partner, the contract will not in most states be considered one of partnership. It is safer to have the agreement expressed in writing, as under the old rule of law the parties became partners under such an arrangement, and in some states it is necessary to have a written agreement to prevent this effect.

A contract of the above nature should provide for the return of the money loaned without reference to profits. Where such a contract concerns the use of property, the title of the property should be carefully reserved to the owner. In all cases where profits are taken without partnership intent, it is prudent to specify in the contract that the party shall receive as compensation "an amount equal to" the proposed share of profits.

If in any of the cases of profit-sharing discussed, the agreement is made for a share of the "gross returns," this wording

shows conclusively that the arrangement is not a partnership. The usual arrangement for renting land for a share of the crops raised is an example of this form of contract, and neither as between the parties themselves nor as to third persons would the relation be one of partnership.

Liability to Third Parties. In dealing with this question it is to be emphasized that *as to third parties* it is the apparent intention of the parties rather than their *expressed* or declared intention which controls. If the acts of the persons under consideration are such as to mislead third persons into believing them partners, they will have to assume the liabilities of partners to such third parties. As between the parties to the agreement, however, the true rule is that "the agreement and intention of the parties themselves should govern in all cases." (See §§ 245, 249.)

Notes:

1. A contract for a share in the profits not intended to create a partnership should always be in writing and provide either for "an amount equal to" the agreed share of the profits, or for a share of the "gross returns," and not for "a share in the profits."
2. Such a contract should also provide that the person with whom the profits are to be shared is not to be a partner, and is to have no control of the business nor liability for its debt.

CHAPTER XLII

THE CONTRACT OF PARTNERSHIP[1]

§ 238. Parties

As partnership is strictly a contract relation, it is essential that the parties to it be competent to contract. (See under § 35.)

If a minor becomes a partner, his acts will bind the firm, since a minor may act as agent. Should the firm become insolvent, however, the minor may take advantage of his infancy, refuse the partnership liability, and leave his associates to bear the entire burden of the partnership obligations, including those which he himself created.

A partnership may be entered into between two firms already existing, or between a firm and an individual, as readily as may any other contract. Under such an arrangement the profits, and in case of dissolution the assets, are divided among the component firms or parties, and then subdivided by the firms among their individual members. The individual members of both firms are personally liable to third parties.

A corporation cannot become a partner unless expressly authorized to do so by its charter. It may, however, make itself liable to third persons as a partner if it attempts to enter into partnership relations.

Notes:

1. Any person who is capable of contracting may become a partner. Corporations before they may become partners must be expressly authorized by their charters to do so.

[1] For forms of partnership contract, see Chapter LXXXVI, Forms 39-41.

§ 239. Kinds of Partners

Partners are of various kinds. There may be general, limited, dormant, and nominal partners.

General Partners. A general or active partner is one who takes part in the management of the business, and who is liable for the firm's obligations without limitation as to amount. An active partner who wishes to withdraw from the firm and cut off subsequent liability, must give notice to all those with whom the firm is doing business.

Limited Partners. A limited or special partner is one who does not participate to the full in partnership liability.

Dormant Partners. A dormant or sleeping partner is one who has invested as a partner but whose connection with the firm is secret and who has no part in the management of the business. A dormant partner has no exemptions or privileges beyond those of a general partner, except as a result of the secrecy. If his connection with the firm is discovered he is liable in exactly the same way and to the same extent as any general or active partner. Unless prevented by the partnership agreement, he may at any time assert himself as an active partner and take part in managing the firm business.

A dormant partner who withdraws without giving notice cannot be held to any subsequent liability of the firm, even though his previous connection with it should become known. His withdrawal, however, does not free him from liability for anything done by the firm during his connection with it.

Silent Partners. The term "silent partner" is often used with much the same meaning as "dormant partner." There is, however, this difference: a dormant partner must be both "secret" and "silent," while a silent partner need not be secret. A silent partner has no voice in the management of the firm business, but may be publicly known as a partner. He is liable for firm obligations just as is any other partner, and if he withdraws, he must give notice to escape subsequent liability.

Nominal Partners. A nominal partner is one who, while not really a partner, in that he has no interest in the business or profits, allows his name to be used or to appear as that of a partner. He is held liable to those who give credit to the firm on the faith or with knowledge of his being a member. He is not, however, liable to a creditor who had no knowledge of his being held out as a partner.

Owners of a business concern which had changed from a partnership to a corporation have been held personally liable for the debts of the corporation because they neglected to notify those with whom they were dealing that the business had been incorporated.

Subpartners. A partner may agree with an outside party to share his interest in the profits and property of the firm. Such an arrangement is termed a subpartnership. It may be entered into without the consent of the firm, and without affecting in any way its existence or operations. The subpartner is not a member of the original firm, is not liable to its creditors, and, under ordinary circumstances, has no right of accounting against it.

Notes:

1. Limited partners should always take care to see that the proper notices and other regulations required by law have been given and complied with.
2. A retiring partner should take care to see that all those with whom the firm has had dealings are notified of his ceasing to be a member of the firm.
3. A nominal partner is liable only if he permitted his name to be used. One cannot be made a nominal partner against his will.

§ 240. Partnership Contracts

The customary and the only proper method of forming a partnership is by written articles of partnership signed by all

the parties. These articles may be a very simple memorandum of agreement, or they may be expanded into elaborate articles of association, providing for the numerous details and possible exigencies of an extended commercial enterprise.

In spite of the dangers of such a course, partnerships are frequently formed by oral agreement. Under the Statute of Frauds, an oral contract of partnership to last more than a year is not valid. If, however, immediately upon making the contract, the parties thereto enter upon its performance, a partnership at will is thereby formed, which is legal and is governed as to its terms by the contract, but which may be terminated at any time by either party, regardless of the terms of the contract.

It must be borne in mind that the Statute of Frauds does not apply to verbal contracts made for any period *under* a year. Such contracts are binding for the specified length of time, and cannot be dissolved at will without incurring a liability for damages.

In many cases of partnership there is neither a written nor verbal contract which can be proved, but the parties concerned, either intentionally or unintentionally, have acted as partners, have had a common fund in which they exercised a community of interest, and have shared profits and losses. Under such circumstances they will be held to be partners, both as between themselves and as to third persons.

This same principle applies to the case of parties who assume to be incorporated when they are not. It does not apply to those who have attempted to incorporate legally, but have failed in some point of procedure. They would be a *de facto* corporation and as such capable of doing business.

Laws Regulating Formation of Partnerships. Most partnerships are formed under common law rules that are the same in every part of the Union. In certain of the western states, however, codes of partnership law, intended to regulate gen-

eral partnerships, have been enacted. Entirely apart from these general partnership codes, nearly all the states have provided for the organization of partnerships with special or limited partners. (See Chapter LXXXVI, Forms 39-41.)

Notes:

1. The contract of partnership should always be in writing.
2. The state partnership law should always be consulted in the formation of any partnership, and especially in the case of a limited partnership.

§ 241. The Firm Name

The usual practice where there are two partners is to use both names; the name of the leading partner naturally coming first. If there are more than two partners, all the names may appear, though this is unusual in mercantile partnerships. Usually but one or two names appear, the other names being represented by the addition, "& Co." Professional partnerships on occasion use three and even more names in the firm title.

In the absence of statutory restriction any title that is preferred may be used as a firm name, even though it contains no partner's name, for instance, such a name as "The Ansonia Furniture Company." In New York and some other states a firm using any name other than the names of the partners or some of them, must register such "trade name" together with the real names of the partners in the county clerk's office, under legal penalty. It is also illegal in New York to use the suffix "& Co." unless it represents existing or former partners. Partners may change the firm name without dissolution or any special formality, or may have more than one name for the firm.

All business of the firm should be done under the firm name, although a partnership may exist and be bound without

any specific firm name by using the separate names of the partners. The firm signature as "Herrick, Simpson & Co.," may be written by a partner or by any agent of the firm.

§ 242. Partnership a Personal Relation

It must be remembered that partnership is a personal relation. Such skill and experience as one partner may possess above the others constitutes as legitimate a form of investment as any other kind of capital. In many cases these are taken as the full equivalent of the financial investments of other members of the firm. In others, they are regarded as a partial equivalent, and in still others extra abilities are recognized by a special salary or a larger percentage of profits.

Notes:

1. Partnership is a personal relation and a partner should always be a man who can be trusted.

§ 243. Classification of Partnerships

Partnerships may be roughly divided into two classes, general and special. While this classification covers the majority of cases, there are a few forms involving peculiarities of partnership law, such as limited partnerships and joint-stock companies, which require separate discussion.

A general partnership is the usual partnership formed for the continued prosecution of some general line of business. It is the commonest form of partnership. General partnerships may be either trading or non-trading.

Trading partnerships include all those formed for the purpose of buying, selling, and manufacturing.

Non-trading partnerships do not buy, sell, or manufacture as a principal feature of their business. These partnerships include professional partnerships, firms of brokers, etc.

A special partnership is formed for the transaction of some single piece of business, or for the conduct of some one line

of business. Examples of special partnerships are as follows: a partnership to buy and sell some definite piece of land, to ship a cargo to some particular place, to buy and operate a threshing machine, to finance and sell a particular patent, or to deal in specified stocks. A common form in the present day is the syndicate organized for the promotion or financing of some large corporate enterprise.

A limited partnership may be formed only under special statutes. It differs from the ordinary partnership in that certain of its partners are silent, or inactive, and the liability of these partners is limited to the amount actually invested by them. These partners are called special partners. If a partner whose liability is thus limited takes active part in the conduct of the partnership business, his status changes and he at once becomes liable as a general partner.

The restricted liability enjoyed by the special partner can be secured only by strict compliance with the statutory directions. These usually prescribe notice to the public of the formation and nature of the partnership and require that a certificate and affidavit of the limitations of the partnership be filed in some office of public registry. In all cases the local statutes should be examined, and their directions followed.

A joint-stock company is a form of business organization formerly popular but now practically obsolete. It is not organized under any statute, and, though usually adopting a corporate name and having some of the features of a corporation, is merely a copartnership, and the shareholders are responsible for the debts of the company as in partnership.

An important difference between such an organization and an ordinary partnership is that its members may transfer their interests exactly as stockholders do in a corporation. If there are many members, affairs are usually managed by a board of trustees or managers, and the individual members have no authority to act in the company affairs.

CHAPTER XLIII

PARTNERSHIP PROPERTY

§ 244. Nature of Partnership Property

The partnership investment is the money or property, tangible or intangible, contributed by the partners for the purposes of the business. The original property of a partnership is derived from the contributions of the partners. When profits are made, they may be drawn out, or they may be allowed to accumulate and meanwhile may be used in the prosecution of the firm business. If retained in the business they are practically merged in the original capital, the two together constituting the partnership property.

Any property purchased with partnership funds becomes *prima facie* partnership property. If such property is taken in the name of a single partner, he holds as trustee for the firm. The firm name, the good-will of the business, and any trademarks used in the business are the property of the partnership, in which each partner has his interest.

When the business is sold, the firm name passes with it. If the business is sold as a whole, the good-will passes with the firm name and the tangible assets.

A firm as such cannot hold real estate. Hence, land must be deeded to the members of a firm to hold as tenants in common, or to some individual, who is usually a member of the firm, to hold as trustee for its benefit. A conveyance of real estate to a firm by name, in cases where the firm name contains the name or names of existing members, passes a legal title to the members named, who will hold in trust for the whole firm. If no member is named in the firm title, no

title passes to anyone, but the seller can later be compelled to deed to the individual members of the firm.

Real estate held for the benefit of the firm is, for all partnership purposes, treated as personal property.

Rights and Interests of Partners. Unless otherwise agreed, the amount of each partner's investment is returned to him in full on dissolution of the partnership, if there are sufficient assets. Any remainder, as profits of the business, is then divided in equal proportion among the partners. If losses have been incurred, the losses must first be apportioned equally among the partners, and the amount to be paid each on his investment account must be diminished by this amount.

A partner has no claim to interest on his investment, nor even on money put in over and above his agreed investment, unless it has been expressly so agreed. It is always possible for a partner to advance money or to let the firm have the use of property of which he retains the right to possession, and such money or property remains his individual property. Money or property, however, put into a partnership *as an investment* becomes the actual property of the partnership.

Right of Surviving Partner. In the case of the death or resignation of a partner, the surviving partners have a right of possession for the purpose of settling up the affairs of the partnership, but after this is done the right of possession ceases, and each of the partners has the right only to his proportion of the partnership assets when converted into cash. In any case of dissolution the assets must be sold, and out of the proceeds each partner must receive his due proportion. If a partner sells his interest, or if it is sold on execution, the purchaser takes only the partner's interest after dissolution.

Power Over Personal Property of Firm. Each partner's power over the property of the firm is the same. Each is agent for all the others in everything that pertains to the care, sale, and management of the partnership property.

A partner has full power to buy and sell personal property within the scope of the partnership business, and the firm is bound by his transactions. This power does not extend to the sale of property used by the firm for carrying on the firm business, as such a sale would tend to destroy the partnership business. Where a sale is to be made of the stock in trade, or of the entire assets, or of fixtures or furniture, all of the firm should join in the assignment.

Power as to Real Estate. One partner cannot make a valid deed to real estate held by the firm, but he can, when such contract is within the scope of the partnership business, make a contract to convey which the courts will compel the firm to perform. Likewise, in a similar case, a partner can make a valid contract for the purchase of land by the firm.

A partnership may be formed by either written or verbal contract for the express purpose of buying and selling real estate. In such cases the realty is treated for all partnership purposes as if it were personalty.

For a legitimate purpose a partner has also the right to pledge or mortgage the real property of the firm. He has, however, no power to sell property of the firm or to borrow money upon it for his own purposes or to pay his own debts, and anyone lending him money, or buying property from him under such circumstances with knowledge, takes no title to the property in question.

The wife of a partner has no right to dower in real estate held for the purposes of the firm until all the claims of creditors and of all the other partners have been satisfied.

Notes:

1. A partner has a right to make use of firm property for the purposes of the business in common with all the other partners.
2. He has no right to firm property personally until the firm has been wound up and the assets divided, un-

less he has loaned property with the express provision that it is to remain his individually.

§ 245. Liability of Partnership Property for Debts

A partner's interest can be reached by attachment or by execution. This interest, however, is merely a right to a certain proportion of the surplus after debts are paid and the affairs of the partnership are adjusted, and this is all that can be reached by legal process. The effect of the sale of a partner's interest under execution would be to give the purchaser the right to merely the same interest in value that the debtor partner had. Such a sale would, of necessity, dissolve the partnership, and make necessary an immediate settlement of its affairs. All partnership debts must be settled before anything is set aside for a purchaser under execution.

Execution following judgment on a claim against the firm runs in the names of the individual partners, and can be levied on the partnership property, or on the individual property of any of the partners. If it is levied on individual property, the partner to whom such property belongs has recourse against the other partners for their proportions of the debt.

On execution against the partnership there can be no claim for homestead or exemption out of the joint assets. This is the general law, but it does not apply to New York and a few other states, in which the provisions of the exemption law extend to property owned by a partnership of which the debtor was a member. (See § 249.)

Assignment for Benefit of Creditors. An assignment for the benefit of creditors can be made only by all the partners acting together. If, however, one partner makes such an assignment, the others may, if they choose, ratify his action, thus making the unauthorized assignment valid. In case a partner has absconded, or cannot be reached, the remaining members of the firm, acting together, may make a valid assignment.

It has, however, been held in New York that one partner may transfer the partnership effects directly to a creditor of the firm, without the knowledge or consent of his associates, and that the courts will sustain his action.

Under the National Bankruptcy Law, however, in any case where an assignment is made when the firm is insolvent, any aggrieved creditor may proceed under the Bankruptcy Act.

For the liability of individual partners to third persons, see §§ 237, 249.

Notes:

1. If an assignment of partnership property has been made, any creditor can bring a bankruptcy suit.

§ 246. Profits

The sharing of profits is an essential feature and the usual object of a partnership. Ordinarily these profits are ascertained by deducting the current expenses from the current receipts, or gross profits, or, on dissolution or any general accounting, by deducting the firm indebtedness and the original partnership investment from the total partnership assets. As there is often room for differences of opinion as to what constitutes profits, it is well to define in the articles of association how they are to be determined.

In the absence of a special agreement otherwise, the common law rule governs the division of both profits and losses. Under this the partners must share equally, without any variation, or any allowance for the greater value of services rendered, the greater amount of time devoted, or the greater investment made by one or the other of the partners. This is usually arranged by agreement, however, so that partners who devote more time or money to the business, receive a more nearly commensurate return. Salaries for services and interest on investments are sometimes provided for in the partnership agreement.

The rule of good faith requires that all profits made within the scope of the partnership business shall be turned in for the benefit of the entire firm. If any partner violates this rule and uses his position in the firm and the knowledge he has of the business to secure any secret rebates, commissions, or other profits for himself, he will, if discovered, be held liable to the firm for the amount so realized.

If a partner uses firm funds in his private speculations he can be compelled to account for any profits. If the result is a loss, he must bear this himself, returning the partnership funds intact. This rule also applies to the use for private gain of time or skill which should be applied to the firm business.

Right to an Accounting. Every partner is entitled to have accurate accounts kept. The right exists whether or not any reference has been made to it in the terms of agreement. This makes it the duty of each partner to keep an accurate record of his own transactions concerning the firm business. If, as is usually the case, some one partner or some particular employee is designated to keep the firm books, it is the duty of each partner to furnish such accountant full information as to his transactions.

It is also the right of every partner to have access to the firm books and accounts and to make extracts therefrom.

Notes:

1. Any proposed extra share of profits to any partner should be specified in the partnership agreement.
2. The books of account should always be kept at the office of the firm, or, if it has more than one, at the principal office.
3. Partners should make every effort to keep their accounts straight, for, if the accounts have been garbled or falsified or the books mutilated, every presumption will be allowed against the partner who is at fault

CHAPTER XLIV

POWERS AND LIABILITIES OF PARTNERS

§ 247. Powers of Partners

In a partnership each partner has equal authority with the others and is held to be the agent of the others, and of the firm, for any transactions within the scope of the partnership business. Hence each partner within this limit is bound by the acts, the contracts, and even the frauds of his associates, and is responsible for the obligations and liabilities so created as fully as if he had himself acted or contracted.

In the absence of special restrictions on the agency powers of the partners, they are limited only by the scope of the partnership business and by the ordinary limitations of the powers of agents. Thus, under his general powers, a partner acting alone may bind the firm in any matter properly within its business operations. He must, however, be authorized before he can bind it by executing a sealed instrument in the firm name.

Partnership notes, as firm obligations, come under the general rules for mutual agency. Every member of a trading firm has a right to make and indorse notes, and to make, accept, and indorse drafts and other commercial paper in the firm name. One of the members may use this power fraudulently, or for his private benefit, but, unless the payee or owner of the note is aware of this fact, the firm is liable on the note.

In the case of a non-trading partnership, however, it is not customary for the partners to bind the firm by issuing negotiable paper, and, unless it can be shown (1) that the partner was authorized to issue commercial paper, or (2) that

in the particular business it was in accordance with usage for the partnership to bind itself in this manner, the firm is not bound.

If the business does not require notes or contracts, any such instrument signed by a partner with the firm name may be rejected or accepted at discretion by the firm. If rejected, it cannot be enforced against the firm, though the partner signing would be liable.

A person with a claim against a partner cannot safely take in settlement a note signed by him with the partnership name, as such act would be clearly beyond the ordinary authority of the partner, but such a note after it was passed on for value to an innocent holder would bind the firm. An indorsement of the firm name by a partner on the note of a third party, outside of the scope of partnership business, would be void.

It is always possible to restrict the powers of any one or all of the partners as among themselves by limitations in the articles. Such restrictions do not, however, affect third persons, unless they have had notice of the same. In a limited partnership, the partner whose liability is limited can take no part in the management. In such a case the limitations of his powers and the general nature of the partnership are notified to third parties under the provisions of the laws regulating such partnerships.

The majority rule in a partnership, each partner being entitled to an equal voice in the management of its affairs without regard to the amount of his investment. The majority may decide all matters of business policy and all questions relating to the general conduct of the business, and when and to what extent profits are to be divided, so far as these matters are not prescribed in the articles of copartnership. The majority must, however, in all cases rule fairly, must consult with the minority in regard to any proposed action, and must allow the minority to be heard in discussion of the

same. They cannot apply the capital to new undertakings outside the scope of the partnership business, nor can they seek their own interest as against the common interest.

Where the partners are evenly divided concerning any proposed action, a deadlock results and those who want to make a change are at a disadvantage. In a partnership of two no change can be made and no new action undertaken unless both can agree. Where articles exist no change can be made in any part save by unanimous consent of all the members of the partnership.

A single partner, by reason of his powers as an agent of the firm, may commit his associates to action against their wishes. In such case, the only remedy is to dissolve the partnership.

As to partners' power over firm property, see § 244.

Notes:

1. If any restriction is to be made on the agency powers of a partner, all those dealing with the firm should be notified in order to protect the firm.
2. A person dealing with a partner is bound to know what the nature of his business is, and it is his own fault if he accepts notes and contracts that are void because they were not within the limits of the partnership business.
3. If a partner is not trustworthy, he may bind his copartners without right.

§ 248. Liabilities to Copartners

Partnership is practically a personal relation, and those who enter it are expected to act honestly and fairly toward their associates. No partner may seek his own advantage at the expense of his associates, nor may he make any personal and private profit out of a transaction in the line of the partnership business. All transactions must be for the common

good, and in important matters a partner should consult his associates before taking action.

A partner will not be allowed to retain an unfairly made profit, nor to compete with his firm. He may, unless expressly restricted by his partnership agreement, carry on an independent non-competing business of his own, provided that it does not interfere with his duty to his firm. Any profit made in a competing business, or in a business that did interfere with the firm business would be held to have been made for the firm, and the other partners could compel their associate to account for his unfair profits.

In the absence of any restrictions in the articles, a partner may give to non-competing ventures time which might have been devoted to partnership affairs. He may also use information acquired by him in the partnership business in his private undertakings, provided these latter are not within the scope of, and do not compete with, the business of the firm.

A dormant partner (see § 239) may retire without giving notice, save to his associates in the firm. He remains liable on the obligations contracted while he was a member of the firm, if anyone learns of his connection with it.

Notes:

1. Good faith is necessary in all dealings between partners.
2. The partnership agreement should provide that each partner shall give his whole time, or a specified part of his time, to the partnership affairs.
3. A partner can retire at any time and so dissolve the partnership.
4. A retiring partner should examine the local laws with care to make sure he has complied with the legal requirements for notice of the severing of his connection with the firm.

§ 249. Liabilities to Third Persons

Where a partnership is admitted or proved, and where a contract within the scope of the partnership business has been made by a partner, each individual partner is liable, and in case judgment is had against the firm, executions may be levied on the firm property, or on the separate property of any one of the partners. That is, the creditors may take judgment against all the partners and may then proceed to collect their claims from firm assets or from the property of any one or more of them, leaving the partners to adjust the matter between themselves afterward as best they may.

A partner is liable in damages for the torts, frauds, and wrong-doing of his partner within the scope of the partnership business, but usually he will not be held criminally liable.

Notes:

1. In order to enforce partnership liability, third persons must as a rule prove the existence of a partnership.
2. The onerous character of partnership liability demands prudence in selecting a partner.

CHAPTER XLV

TERMINATION OF PARTNERSHIP

§ 250. Termination by Agreement

Upon the expiration of its term as limited by the partnership articles, the partnership will be dissolved in any particular manner prescribed by the articles, or, in the absence of such provisions, in accordance with the rules of the common law.

A partnership may be dissolved at any time by unanimous agreement regardless of the period fixed by the articles. If any of the partners wish to continue the business, they may buy out partners who wish to retire or who are dissatisfied.

In many cases the most satisfactory method of disposing of a partnership business worth preserving, is by incorporation. This is preeminently a dissolution by agreement. (For methods of incorporation, see Chapter LII.)

§ 251. Enforced Dissolution

A partnership may be terminated by the death or bankruptcy of a partner, or by the sale of his interest. It may also be dissolved because of the impossibility of continuing the business for any reason, or by the bankruptcy of the firm. Mere insolvency may exist for an indefinite period without affecting the partnership relation, but an assignment by the firm for the benefit of creditors, or an adjudication of bankruptcy terminates the partnership.

If a partner wishes to terminate his partnership relations, he may do so at any time simply by giving notice to the members of his firm, to those dealing with the firm, and to the public generally. If the partnership was for a given term which has not expired, the partner may be liable in damages

to his associates for his breach of the partnership contract, but cannot be compelled to remain.

After giving proper public notice of his withdrawal, the retiring partner is no longer liable for the future transactions and obligations of the firm. He remains liable, however, on the obligations contracted while he was a member of it. The matter of notice is important, as it is the only way in which liability for the future obligations of the firm may be escaped.

When a partner dies or becomes bankrupt, or when war is declared between the countries to which the respective partners belong, the partnership is forthwith terminated, the relation of mutual agency ceases, and neither a partner nor the representative of a partner can bind the partnership nor the property or estate of either partner further. Nothing can be done except to liquidate, pay debts, and wind up the partnership affairs.

The insanity of a partner does not work a dissolution, but may be a sufficient reason for asking a dissolution by decree. If the insanity is temporary, the courts will not decree a dissolution.

Where it becomes apparent that only loss can result from the further prosecution of the partnership business, any partner, if his associates will not agree to a peaceable termination of the business, can obtain a judicial dissolution.

A breach of the articles of partnership by any of the partners, bad faith, or misconduct so serious as to affect the credit and success of the business or to make it impossible for his associates to work with him, is good ground for dissolution.

In case a person has been induced to enter a partnership by false representations, he can at once dissolve the firm or bring suit to have the whole contract rescinded and cancelled.

In all of the above cases, proceedings may be instituted to have the partnership dissolved and to secure an accounting. If necessary, an injunction may usually be had restraining the defendant partners from making new firm obligations, from

interfering with or disposing of firm property, or from further conduct of the firm business. The appointment of a receiver is an extreme measure to be resorted to only when the interests of some member of the firm, or of outside creditors are in urgent need of protection. The courts are slow to grant it.

The right to an accounting is a necessary corollary to the right to profits. An accounting is a necessary incident of a dissolution unless the parties have already agreed upon a settlement, which would be a bar to the right. The usual procedure is to appoint a referee, or refer the accounting to a Master in Chancery to examine and report the terms of the partnership, the accounts that have been kept, the capital invested and withdrawn, the profits and the losses, the assets and liabilities, and the proportion in which these should be shared among the partners. The court then makes its orders in accordance with this report, and the receiver, or the partner or partners in charge, will close up the business pursuant to these directions.

Notes:

1. Where it is necessary actually to wind up the business, any agreement reached between the partners should provide for a trustee to take charge of the settlement on behalf of the partners. The agreement should direct the closing up of the business, the liquidation of its assets, the collection of outstanding debts, the settlement of its obligations, the partition of losses or the division of profits, and the withdrawal of the investments of the partners.
2. Under no circumstances have the partners in an ordinary partnership the right to expel an objectionable member. The only way to get rid of such a partner is through a dissolution of the copartnership.
3. The legal enforced dissolution of a partnership is slow and costly and if possible should be avoided

§ 252. **Winding Up the Business**

If one or more partners are bought out, the business passes as a going concern into the hands of the remaining partners. If the partnership is dissolved by proceedings in equity or in bankruptcy, the receiver or trustee takes charge, and the partners turn over the assets to the receiver and have nothing further to do with the business other than to give such information as will aid him in his work.

If the partnership is incorporated, the corporation usually succeeds to the assets, name, good-will, and location of the firm, and the business is continued as a going concern with the minimum of disturbance.

Duties of Partners on Dissolution. If the business is terminated by agreement, by limitation, or by the death, insanity, or insolvency of a partner, it is usually wound up by the surviving or liquidating partner or partners.

When surviving or liquidating partners take charge, it is their duty to notify people who have dealt with the firm, of its dissolution and of the fact that they are engaged in winding up affairs. It is also the duty of these partners to dispose of and fulfil any existing contracts, to dispose of the partnership property to the best advantage, to discharge all debts and obligations, and to turn over to each person entitled thereto his due proportion of the surplus.

After the assets of the firm have been turned into cash and the debts have been paid, it is the duty of the surviving or liquidating partners, first, to repay any advances above the stipulated investment of capital to the partners who made them; next, if the funds permit, to return the capital of each partner. Any surplus is then divided among the partners in such proportion as the partnership agreement may provide, or, if there is no provision therefor, in equal proportion.

Notes:

1. Surviving or liquidating partners have no power to

bind the firm to new contracts or to undertake new business. Ordinarily they are not entitled to compensation for their services in settling the firm's affairs.

2. The good-will of a business is often a most valuable asset. To secure compensation both for the good-will and the firm name, it is usually necessary to sell the business as a going concern.

Part IX—Corporations

CHAPTER XLVI

NATURE OF CORPORATIONS[1]

§ 253. Corporate Entity

A corporation is an artificial person, created or authorized by the law for some particular purpose or purposes. It has, therefore, only those rights and powers which are given it by the law. These vary in the different states but are in all cases sufficient for the demands of ordinary business.

A corporation is usually composed of a number of persons associated together, though it may, and sometimes does, consist of but one or two members. These members, or stockholders, are not, however, the corporation. They compose it, but the corporation has a name, an entity, and an existence of its own, entirely apart and distinct from that of these members. Under its corporate name it may conduct business, make contracts, and bring suit. So absolutely different is the corporation's existence from that of its stockholders that it may enter into contracts with these latter, may sue them, or be sued by them.

§ 254. Classification

A logical classification is that which separates all corporations into (1) public and (2) private corporations.

Public corporations are those formed by the community for its own governmental purposes, as in cities, villages, and towns. These are called municipal corporations.

[1] See Chapters LXXXVII to LXXXIX, corporate forms.

All other corporations are private corporations.

Corporations formed to conduct public utilities, such as railroads, turnpikes, and telegraph systems, or to supply water, gas, and electricity, if they are conducted for private gain, are properly classed as private corporations.

Private corporations may be divided into corporations without capital stock and corporations with capital stock.

§ 255. Corporations Without Capital Stock

Most religious, educational, charitable, and social organizations belong to this class. They are non-stock, or membership corporations. In some cases certificates of membership are issued to the members, but these are not stock certificates and are not usually transferable. When corporate action is taken, each member has one vote without regard to the amount of his financial interests, if any, in the corporation.

The body of modern corporation law has to do with the stock corporation.

§ 256. Corporations With Capital Stock

Stock corporations have a capital stock divided into shares, usually of like amount, which are evidenced by transferable certificates of stock. These stock certificates are issued to the members of the corporation, who are termed stockholders, the certificates evidencing the number of shares which each owns.

The ultimate control of the corporation rests with the stockholders, who act in meetings and by vote. Each share of stock usually entitles its owner to one vote in stockholders' meetings; hence those owning a majority of the shares control the corporation. When profits are to be divided, they are distributed among the stockholders in proportion to the number of shares owned by each.

On account of the convenience of the system, all corporations intended for profit are organized as stock corporations.

§ 257. Distinctive Features

The distinctive features of a modern stock corporation may be summarized as follows:

1. Its creation and regulation by the state.
2. The limitation of the corporate powers to the objects specified at the time of its creation.
3. The limitation of the liabilities of the stockholders.
4. The distinct entity of the corporation for all legal and business purposes.
5. The permanence of its organization.
6. The representation of the interests of the stockholders in the corporation by transferable shares of stock.
7. The corporate mechanism of directors, officers, and agents, working under definite rules of action.

These features are possessed by every stock corporation, and every organization possessing them is a stock corporation.

§ 258. (1) Creation by the State

A partnership may be formed by the mere agreement of the parties. A corporation, on the contrary, may be created only by the state. Formerly each corporation was created by a separate legislative enactment. Today the formation of corporations is governed by general laws. These laws vary in minor details in the different states. All are alike in their general plan and scope.

§ 259. (2) Limited Powers

An individual or a partnership may engage in any business that seems best, and may change from one business to another at pleasure. A corporation, on the contrary, is limited to those purposes enumerated in its charter. If it is desired to engage in any other business, it must amend its charter.

§ 260. (3) Limited Liability

Subscribers to the stock of a corporation are liable to the corporation for their subscriptions. If these have not been paid, the corporation, or its creditors in case of its insolvency, can compel payment. Also if subscriptions are accepted by the corporation at less than par, corporate creditors can usually force payment of such additional amount as will render the stock full-paid. (See § 286.) Beyond this liability, known as the subscription liability, stockholders have in most states no individual liability for any indebtedness of the corporation.

§ 261. (4) Legal Entity of Corporation

The distinct legal entity of the corporation may best be shown by a comparison between corporations and partnerships. The difference is radical.

A partnership is merely a collection of all the individual partners. Hence each partner represents the partnership fully, can make contracts for it without consultation with other partners, and can bind it by his action. On the other hand, he cannot contract with his partnership, bring suit against it, or be sued by it, any more than he could so act with or against himself.

A corporation, on the contrary, is itself a legal entity, distinct from its stockholders. These stockholders as individuals do not represent it, cannot make contract for it, nor bind it in any way. Each may, however, deal with the corporation as with a stranger, may contract with it, may sue it, may be sued by it.

§ 262. (5) Permanence

A partnership may be dissolved at any time, at the will of any partner, and is necessarily dissolved if a partner dies, becomes insolvent, or sells out to a stranger. A corporation,

on the contrary, continues for the term of its existence, uninterrupted by the dissatisfaction, financial embarrassment, death, or retirement of its stockholders. Its entire membership may change again and again, but the corporation continues.

§ 263. (6) Stock System

The division of the stock of the corporation into shares represented by stock certificates, transferable by indorsement, is one of the most convenient features of the modern corporate system. It permits the investment of varying amounts, and gives each investor his proper proportionate interest both in the management and in the resulting profits of the business. It permits a ready sale of part or all of the stockholder's interest to some other investor. In case of his death it renders the transfer or division of his interest a simple matter. It is in striking contrast to the difficulty of transferring an interest in an ordinary partnership.

§ 264. (7) Corporate Mechanism

A corporation is created by the grant of a charter from the state, which in general terms defines the rights and powers of the corporation. After this charter has been allowed, the incorporators hold a meeting and adopt by-laws which lay down the lines along which the business of the corporation is to be conducted. The stockholders elect a board of directors, which, subject to the regulations of the charter and by-laws, controls and manages the business and property of the corporation.

The directors at their first meeting elect officers and take such other action as may be necessary to inaugurate the corporate activities. Thereafter they hold their meetings from time to time as may be required by the by-laws or the necessities of the business.

§ 265. (8) Attractiveness to Investors

As a consequence of the advantages enumerated, and because of the liabilities and inconveniences of the partnership, the corporate form is peculiarly attractive to the investing public. Created by the state for a fixed period, it is not liable to sudden or unexpected termination. The rights and liabilities of all concerned are defined by law and well settled by custom. It permits investment to a definite extent without indefinite or continuing liability and without the necessity of the investor becoming identified with the management.

CHAPTER XLVII

THE CHARTER[1]

§ 266. Definition—Synonyms

The terms, certificate of incorporation, articles of association, etc., are synonymous with the older and briefer word, charter. A charter is the formal authority from the state for the existence of a corporation. It is to the corporation what a constitution is to a civil government. It is the foundation upon which the corporate structure is built.

The charter creates the corporation and authorizes certain specified individuals to organize it and conduct its operations. Charters were formerly granted only by special legislative enactment. Now they may be secured under general laws and in many states can be secured in no other way.

§ 267. Charter Powers—General

The grant of a charter bestows upon a corporation all the powers properly specified in the application for a charter. In addition to these specified powers—which are usually those necessary to conduct the business or enterprise to be undertaken by the corporation—the charter confers certain general powers, whether specified or otherwise. These general powers are as follows:

1. To sue and be sued.
2. To use a seal.
3. To buy, sell, and hold property.
4. To appoint directors, officers, and agents.

[1] See also Chapter LII. For form of charter, see Chapter LXXXVII, Form 45.

5. To make by-laws.
6. To dissolve itself.
7. To do all things necessary.

These are discussed in order in the following sections:

§ 268. (1) To Sue and Be Sued

When a partnership is sued each partner must be named separately and be made a party to the action. A corporation may sue or be sued under its corporate name just as may an individual. No mention need be made of its stockholders. A summons may be served on any managing officer, on any director, or on an agent in charge of the corporate affairs.

§ 269. (2) To Use a Seal

Formerly the seal was the essential feature of the corporate signature. Now the corporate signature may be affixed by any properly authorized agent without the use of the seal, save in those few cases where an individual must use a seal, as in the conveyance of real estate or the execution of a bond.

The custody of the seal usually rests with the secretary of the corporation.

§ 270. (3) To Buy, Sell, and Hold Property

This power must be taken with some qualifications. The property must be such as pertains to the business of the corporation and such as it is permitted to hold under the laws. In some states the ownership of land by corporations is restricted. Also in many states a corporation may not hold shares of stock in another corporation.

§ 271. (4) To Appoint Directors, Officers, and Agents

This power is absolutely necessary as the corporation can act only through such representatives. The stockholders at

their annual meeting elect directors who have charge of and manage the corporate affairs. These directors then meet and elect a president, a treasurer, a secretary, and such other officers as may be desired. Agents may be appointed by the directors or by the officers, when authorized thereto.

§ 272. (5) To Make By-Laws

The by-laws are adopted by the stockholders. They are the working rules of the corporation and provide for the details of its operation. The by-laws are subordinate to the laws of the state and to the charter of the corporation, and their provisions must not be inconsistent with either. Under this limitation, however, the by-laws have wide scope.

§ 273. (6) To Dissolve Itself

When a corporation has failed in its object, or has become unprofitable, or has completed its intended purpose, or has disposed of its business and property, its dissolution may become desirable. Formerly the unanimous consent of all the stockholders was generally required for dissolution. Now in most states some specified majority of the stockholders by simple statutory proceedings may dissolve the corporation. In such case the assets are sold, and, after payment of any corporate debts, any remaining funds are divided pro rata among the stockholders.

§ 274. (7) To Do All Things Necessary

A corporation organized for some specified purpose has the legal right to make all contracts and do all proper things necessary to carry out that purpose, as, for instance, a corporation organized to build and operate a factory would without special authorization thereto have the right to buy and hold the real estate required for the erection of its plant.

§ 275. Charter Powers—Special

The special powers of a corporation are those specifically mentioned in its charter which, if not so mentioned, it would not possess. The usual purposes for which corporations are formed, with their amplifications, are included among these, but in most states the law allows many further powers that add much to the value of the corporate system.

Among these may be mentioned provisions as to the issue of preferred and other special stocks, the system of cumulative voting, the power to hold stock of other corporations, etc. Also restrictions of various kinds may be embodied in the charter, such as limitations on salaries to be paid officers, or restrictions on the power to mortgage the corporate property or to contract indebtedness generally.

§ 276. Things Ultra Vires

An individual or firm may do anything not forbidden by the law. A corporation may do only those things expressly permitted to it under the law. All other things are beyond its powers, or in legal parlance, *ultra vires*. Contracts not yet carried out by the other party, involving matters *ultra vires*, cannot be enforced by the corporation; but if these other parties to a contract have performed their part, the contract may be enforced against the corporation—that is, a corporation cannot evade its obligations by the plea of *ultra vires*. Directors and officers may make themselves personally liable if they involve the corporation in transactions of this nature.

§ 277. Amendment of Charter

Any corporate right or privilege that might have been secured in the original charter of a corporation may, in most of the states, be secured by charter amendment, and such amendment may be made at any time, even before the organization of the corporation is completed.

As a preliminary step, amendments of the charter usually require the assent of at least two-thirds of the outstanding stock of the corporation in the manner prescribed by law—usually by vote at a regularly called meeting. The amendment so authorized is then as a rule filed in the same offices and with the same formalities as the original charter, becoming effective as soon as allowed and filed.

CHAPTER XLVIII

BY-LAWS[1]

§ 278. Definition

By-laws are the more permanent rules of corporate action as distinguished from motions and resolutions, which usually apply only to particular occasions and special matters.

A corporation is controlled (1) by the corporation laws of the state in which it is domiciled, (2) by the provisions of its charter, and (3) by its by-laws, these three ranking in the order given as to authority. Hence any by-law that does not accord with the statutes of the state and also with the provisions of the charter of the particular corporation is void.

By-laws are enacted by the stockholders and by them alone, unless, by statute, by charter provision, or by action of the stockholders themselves, such power has been delegated entirely or in part to the directors of the corporation.

§ 279. Adoption

A corporation is not compelled to adopt by-laws. Its operation without them would, however, be practically impossible.

A reasonably complete set of by-laws is usually adopted by the stockholders at their first meeting, and these by-laws are added to, amended, or repealed from time to time thereafter as may be necessary.

By-laws should be carefully drawn, properly adopted, and accurately recorded in the minute book of the corporation. They should provide fully for all the important details of corporate procedure, such as the issuance and transfer of

[1] For form of by-laws, see Chapter LXXXVII, Form 46.

stock, the meetings of the stockholders and directors, the election of directors and officers, the respective duties and responsibilities devolving upon these, and the care and management of the corporate property and finance. They should also include the more important provisions of the charter and of the statute law as far as applicable. This is done in order to provide a convenient and accessible memorandum of these provisions. Without this they might be overlooked or forgotten.

§ 280. Amendment

The by-laws usually prescribe the method of their own repeal or amendment. Unless otherwise provided by statute, charter, or by proper provision in the by-laws themselves, these by-laws may always be repealed or amended, either in whole or in part, by a majority vote of a quorum of stockholders at any regular meeting, or at any special meeting duly called for that purpose. The directors have no power to repeal or amend by-laws under any circumstances unless such power is expressly given them by the laws of the state of incorporation, by the charter of the corporation, or by its by-laws.

§ 281. Enforcement

Direct penalties for the violation or non-observance of by-laws are sometimes provided. These usually take the form of fines. Such penalties are, as a rule, unsatisfactory and very difficult of enforcement. The smaller infractions are usually passed over, or recurrence is prevented by the substitution of more reliable officials at the next election. The more serious violations bring their own penalties in the legal liabilities and entanglements that necessarily follow. Corporate action taken in disregard of by-law provisions is, for that reason, not only illegal but may at times involve the directors and officers concerned in personal liabilities.

CHAPTER XLIX

STOCK[1]

§ 282. Capital Stock

The capitalization or capital stock of a corporation is the amount of stock as fixed by its charter which the corporation is empowered to issue. This amount can be changed only by amendment of the charter. This capital stock is regarded as divided into equal shares, termed "shares of stock." When by purchase or otherwise a person acquires an interest in the capital stock, he becomes a stockholder in the corporation, and his interest is expressed in these shares of stock.

The par or face value of shares of stock is fixed by the charter of the particular corporation, and, unless expressly limited by statute, may be placed at any amount desired by the incorporators. This par value can be changed only by charter amendment. One hundred dollars is the most common par value of shares. The number of shares owned by any individual gives an accurate measure of his interest in the corporation. For instance, if a man owns ten shares of the par value of $100 each in a corporation with a capitalization of $10,000, all of which is issued, he owns a total stock interest of one-tenth of the entire outstanding capital stock, and therefore has an undivided one-tenth interest in the entire corporate property and business.

The par value and the actual value of a share of stock may be very different. A hundred dollar share of stock in a prosperous corporation will frequently be worth several times that amount, while in an unsuccessful corporation it may be

[1] For form of subscription list and stock certificate, see Chapter LXXXVII, Forms 4-44.

worth little or nothing. In either case the par value remains the same.

§ 283. Stock Certificates

Stock certificates are issued as a convenient evidence of the stockholders' interests in a corporation, and every stockholder whose stock is paid for has a right to such a certificate. These certificates state the number of shares owned, their par value, and usually any other material facts affecting the stock in question, as, for instance, if such be the fact, that it is full-paid, or that it is preferred stock. These certificates of stock are signed by the president and secretary, or president and treasurer of the corporation and are sealed with the corporate seal. When properly issued, they are conclusive evidence of the ownership of the stock represented by them.

The stock certificate, as already stated, is merely the evidence of ownership of stock and is not the stock itself. The stock of a corporation usually exists before stock certificates are issued at all, and may be bought and sold by proper entries on the corporate books.

Each share of stock usually entitles the owner of record to one vote in all proceedings of the stockholders, whether assembled in annual or special meeting. In most states, by proper charter provision the voting power of stock may be restricted, or stock may be issued without the voting power. Preferred stock is very frequently so issued. Unless expressly denied or restricted by proper provision, all stock has the usual voting power and this right may be exercised by the owner of record in person, or, usually, by proxy.

§ 284. Capital Stock vs. Capital

The "capital stock" or capitalization of a corporation should be very clearly distinguished from its "capital."

The capital stock is the total amount of stock the corpora-

tion is authorized by its charter to issue. This amount is fixed in the first place by the parties organizing the corporation—who are termed the incorporators—and, once accepted and authorized by the state, may be changed only by formal amendment of the charter.

The capital, on the other hand, is the actual amount of property owned by the corporation, that is, its assets. It is obvious that the value of these assets is liable to change with the fluctuations of the business or from other causes. The capital stock of the corporation and its capital, therefore, even though equal at first, may and frequently do differ greatly in amount. For instance, the capital stock of the Chemical Bank of New York City is $3,000,000 while its capital is over $7,500,000.

§ 285. Unissued and Issued Stock

Unissued stock is not an asset of the company but is merely an unexercised right to issue stock when and as subscriptions for it can be obtained.

It usually represents excess capitalization. For instance, a corporation organized to take over property worth $20,000 might perhaps be capitalized at $25,000 with the idea of selling the excess stock at some future time to raise working capital.

Issued and outstanding stock is stock which has been issued for cash, property, labor, services, or other values, or which has been subscribed for and the subscriptions accepted by the company. Such stock is issued stock and the subscribers or purchasers are stockholders of the company, even though the actual certificates by which this stock is represented may not have been issued.

§ 286. Full-Paid Stock

In most of the states, payment for stock may be made in anything of value. If the corporation has received the full

face value for issued stock in cash or in any other form of payment permitted by law, such stock is termed full-paid, and its certificates should be marked "Full-Paid" in order to indicate this fact. After stock has once been issued for full value, it may be sold at less than par without involving the purchaser in any liability for the difference.

If the corporation has not received the full face value for issued stock, the stock is but partly paid, and the purchaser of such stock may usually be held liable for the amount necessary to render it full-paid. This liability may be enforced either by the corporation, or, in event of its insolvency, by any creditor of the corporation.

Watered stock is stock for which the corporation has not received full payment in cash, services, or property. Watered stock is usually created by the issuance of stock in payment for property or services which have been overvalued; sometimes also it is created by the issue of stock insufficiently supported by the corporate property, as for instance, in cases of unwarranted stock dividends.

§ 287. No Par Value Stock

In some states, as in New York, stock may be issued having no par value. Its value is the market rate. Here the stock is full-paid when it is sold at whatever can be obtained for it in the market, and there is no further liability.

§ 288. Common Stock

Common stock is the general or ordinary stock of a corporation, with neither special privileges nor restrictions. If any portion of the stock is given special privileges or restrictions, that portion is thereby removed from the class of common stock and the remainder constitutes common stock. Any statements made concerning stock, when the class is not specified, are usually understood to apply to the common stock.

§ 289. Preferred Stock

Preferred stock, as the term is usually employed, is that which has some preference as to dividends or assets over other stock of the same corporation. This preference is usually secured to it by special provisions in the certificate of incorporation, though in some states this may be attained by by-law provision.

Preferred stock may be either cumulative or non-cumulative as to dividends. Non-cumulative preferred stock must receive its preferred dividend for the current year before any dividend is paid the common stock, but if in any year its dividend fails or is only partly paid it loses the unpaid amount. If the dividends on cumulative preferred stock are not paid in any year, or years, or are but partially paid, the amounts unpaid go over, or cumulate, and must be satisfied before the common stock receives anything. They remain a charge against the profits of the company until paid in full.

It is usually provided that preferred dividends shall be paid in full before the common stock receives any dividend. Unless otherwise expressly provided, after the preferred dividends are paid in any year, the common stock receives an equal dividend if the profits are sufficient, and both kinds of stock then share alike in any further dividends declared in that year. It is sometimes provided that, after the preference dividends are paid, the preferred stock shall share equally in all further profits with the common stock. Preferred stock is sometimes limited to its preferred dividend and does not participate at all in any further dividends.

It is often provided that in case of dissolution preferred stock shall be satisfied out of any assets of the company before the common stock receives anything. If this provision is not made, either by statute or by charter, the preferred stock in any liquidation of the corporation would first receive any dividends then due, but thereafter would fare the same as common stock.

Preferred dividends may be paid only from profits. If there are no profits, or if the profits are needed for purposes of the business, preferred stock either receives no dividend, or if cumulative, its dividend passes over until profits are made. Unlike a bond, it is not a debt or liability of the corporation. Its owners are stockholders and not creditors, and failure of dividends ordinarily gives no cause of action against the company or its directors.

§ 290. Treasury Stock

Treasury stock, in the better use of the term, is stock which has been issued for value and has by gift or purchase come back into the possession of the company. It differs from unissued stock in the fact that it may be sold below par without involving the purchaser in any liability for the unpaid balance. So long as the treasury stock is held by the company, it can neither vote nor draw dividends.

§ 291. Lost Certificates

A stockholder's rights are not affected by the loss or destruction of his stock certificate. Its absence may involve much inconvenience, more particularly if the stock is to be sold. Usually the by-laws provide that a bond must be required. The directors may, in their discretion, provide for the issue of a duplicate subject to the by-laws.

If a certificate is lost the secretary of the company should be notified promptly, as otherwise the stock certificate might be presented under circumstances which would justify him in making any desired transfer. After notification he would make such a transfer only by direction of the board.

§ 292. How Transferred

Stock certificates usually have a blank form of transfer printed on their backs. If this is simply signed, the stock may

be transferred to anyone, and he will have a right to obtain a certificate made out to himself by surrendering the indorsed certificate to the corporation. If the name of the person to whom it is transferred is inserted, only that person has a right to the stock and to the new certificate.

CHAPTER L

STOCKHOLDERS AND THEIR MEETINGS[1]

§ 293. Incorporators

Incorporators are the persons who sign the certificate of incorporation. They must usually be subscribers for stock and later become stockholders. It is the incorporators who draw up the application and make the charter provisions. After the charter has been accepted, those who have subscribed for stock become stockholders and these elect the directors. (See § 317.)

§ 294. What Constitutes a Stockholder

The stockholders of a corporation are those who actually hold its stock, or who have subscribed for its stock and have had their subscriptions duly accepted by the corporation. A "stockholder of record" is one whose ownership of stock is duly recorded upon the books of the corporation.

When outstanding stock is purchased, the transfer must be entered on the books of the company before the purchaser becomes a stockholder of record, entitled to vote, to share in dividends, and to receive a certificate of stock in his own name. Until that time he is the equitable owner of the stock, but is not known or recognized in any way as a stockholder.

§ 295. Rights of Stockholders

The individual stockholder has but little part in the active management of the corporation.

[1] For form of minutes of stockholders' meetings, see Chapter LXXXVIII, Form 50.

The rights of holders of common stock may be stated as follows:

1. To appear and vote at the annual meeting each year, in the election of directors and upon any amendment of the by-laws or other general matters brought before the meeting.
2. To be notified of and to participate in all stockholders' meetings, in person or by proxy, and to cast one vote for each share of stock held.
3. To share, in proportion to the amount of stock owned, in all dividends declared on the common stock.
4. In event of the dissolution of the corporation, to share in like proportion in any assets remaining after all the corporate debts and obligations have been paid.
5. To inspect the corporate books and accounts.

It should be said, however, that this last right has been so restricted as to amount to little more than the right to inspect the list of holders of stock as shown by the stock ledger.

Holders of preferred stock have the same rights, except as these may have been extended or restricted by the conditions under which the stock was issued.

§ 296. Powers of Stockholders

The powers of the stockholders may be summarized as follows:

1. Adoption or amendment of by-laws.
2. Election of directors.
3. Amendment of the charter.
4. Dissolution of the company.
5. Sale of the entire assets of the company.
6. The exercise of any specially conferred charter powers.

The board of directors is the sole managing and controlling authority of the corporation. The stockholders make the by-laws by which the directors are controlled, and elect the directors by whom the corporate affairs are conducted, but beyond this they do not interfere in any way with the transaction of the corporate business or the management of the corporate property. All this rests with the board. Nor can the stockholders act directly for the corporation. A contract signed by every stockholder would not be the contract of the corporation and would not bind the corporation, unless also signed by its proper officers or otherwise formally accepted by its directors.

§ 297. Liabilities of Stockholders

A stockholder is liable to the company or to its creditors for any instalments remaining unpaid upon stock subscribed for by him. He may also be liable to creditors on any stock held by him which is not full-paid. Should dividends be paid from capital instead of from profits, stockholders are liable to corporate creditors for any amount so received by them.

Also stockholders of national banks and of most state banks and trust companies are held liable in case of the insolvency of their institutions for an amount equal to their original subscriptions.

As a rule, however, in the ordinary business corporation the holder of full-paid stock is in no danger of losing anything more through corporate failure or involvement than the amount he has actually invested in his stock.

§ 298. Stockholders' Meetings

The annual meeting is usually the only regular meeting of stockholders. It must be held in the state in which the company is incorporated, unless the laws of such state expressly provide otherwise, and is usually required to be held in the principal office of the company.

At the annual meeting the directors for the ensuing year are elected, the reports of the officers are presented, any amendments to the by-laws may be submitted and acted upon, and any affairs of the company requiring the action or attention of the stockholders may be presented for consideration. If any sweeping change in the business or policy of the company is desirable, it is usually authorized by action of the stockholders at this meeting.

If action by the stockholders is necessary in the interim between the annual meetings, a special meeting may be called by resolution of the directors, or in any other way that the by-laws may prescribe or permit. This call is followed by a notice to the stockholders, giving the necessary details of the meeting to be held. In case of a special meeting, both call and notice should state its purpose.

§ 299. Quorum

The quorum at stockholders' meetings should be prescribed in the by-laws. The usual provision requires the presence of a majority of the outstanding stock in order to transact business. When a quorum is present, a majority of this quorum has power to decide any question that is brought before the meeting.

§ 300. Voting

Only stockholders of record are entitled to vote at annual and special meetings of the stockholders. Each stockholder of record is entitled to one vote for each share of stock held in his name. That is, if five directors are to be elected the holder of one share may cast one vote for each of these. The holder of five shares may cast five and so on. Under the cumulative system of voting, which is designed to secure for the minority a representation on the board, the stockholder still casts one vote for each director to be elected, but he may cast all five

votes—if five directors are to be elected—for any one candidate or may distribute them among the five as he sees fit.

Voting at elections of directors is usually by ballot.

§ 301. Proxies

Any stockholder entitled to vote at a stockholders' meeting may usually give a proxy (a power of attorney) empowering some other party to attend stockholders' meetings as his representative and vote upon his stock in his stead. (See Chapter LXXXIII, Forms 21-23.)

CHAPTER LI

DIRECTORS AND THEIR MEETINGS[1]

§ 302. Status and Functions of Directors

The board of directors, elected by the stockholders, has the entire management of the corporate affairs.

The directors of a corporation are held to be its agents, and, in a measure, trustees for the stockholders. They are responsible for its proper management.

§ 303. Number and Authority

In most of the states there must be at least three directors. The maximum number is not usually designated. For all ordinary corporations a small board is most convenient, and as a rule most effective.

When the board is unwieldy or difficult to assemble, the actual administration of the corporate affairs is usually delegated to an executive committee composed of from three to five members of the board.

The board elects the corporate officers, appoints such other agents as may be necessary, and has entire charge of the property, interests, business, and transactions of the company. The board of directors is the embodied corporate authority.

The directors can only act collectively and in a regular meeting or in a duly assembled special meeting. A single director, unless authorized thereto by resolution of the board or specially empowered in some other way, has no standing in corporate matters above that of any other stockholder.

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[1] For forms of calls, notices, minutes, etc., of directors' meetings, see Chapter LXXXVIII, Forms 47-49, 51-54.

§ 304. Liabilities

Directors are liable in the same manner as trustees for any wrong-doing; also for any neglect that results in loss to the corporation. For instance, they are liable if they issue stock as full-paid which is not full-paid, or pay dividends out of the capital of the company when there are no profits, or otherwise abuse their power.

§ 305. Qualifications

Most of the states require that directors shall be stockholders of the company; also, usually, that one member of the board shall be a resident of the state of incorporation. In some of the states the stockholding requirement may be waived by proper provision in the charter or by-laws.

§ 306. Vacancies and Removal of Directors

A board of directors may continue to act though there be vacancies, provided sufficient members remain and are present to make up a quorum. Vacancies should, however, be filled as they occur, and authority to do this should be conferred on the board by the by-laws. The board does not possess this power unless it is specifically given.

Directors cannot be removed, either by the other directors or by the stockholders, unless such power of removal is expressly given by the certificate of incorporation, the by-laws, or the statutes of the state.

§ 307. Regular Meetings

The times and places for regular meetings of the directors are fixed by the by-laws. Monthly meetings are generally prescribed. In a small company one regular meeting a year may suffice. Should action of the board prove necessary in the interim, special meetings may be readily called, or be held by consent whenever the occasion arises.

§ 308. Special Meetings

The by-laws should clearly prescribe the method by which special meetings of the board are to be called. Usually it is provided that the president or two or more of the directors may call such meetings. The call must be followed by a notice to each director. Calls for special meetings must specify the time, the place, and the business to be transacted, these details must be repeated in the notice, and no other business than that so specified may be transacted at that meeting.

§ 309. Quorum

A majority of the whole board is usually necessary to constitute a quorum. A majority of the prescribed quorum decides the action of the board. Unless regulated by statute, the charter or by-laws may prescribe the number necessary to form a quorum.

§ 310. Election of Officers

The board can act only through the officers and agents which it appoints. Usually the election of officers is held at the first board meeting in each year after the election of the new directors. In this way the new directors may elect their own officers and thereby secure an official staff in harmony with their views and policy. The usual executive officers of a corporation are a president, vice-president, treasurer, and secretary. Two offices may be held by the same person if the duties are not incompatible.

The president and vice-president, as presiding officers of the board, should be chosen from its membership. Save as to these, the officers need not be selected from the board.

The officers of the company carry out the instructions of the board, and have no independent powers or authority outside the routine duties assigned them by the by-laws or by the statutes.

§ 311. Vacancies and Removal of Officers

The directors have power to fill any vacancies that may occur among the officials of the corporation, for the unexpired term. Officers cannot be removed at the pleasure of the board, unless the by-laws, charter, or statute law give the directors this power.

§ 312. Dividends

The matter of declaring dividends, the time when they are to be declared, and the amount rest in the discretion of the board of directors.

Dividends may be legally declared only from surplus or net profits. If paid from the capital or obtained in any way that will impair the capital of the company, the directors render themselves personally liable, and should the corporation become insolvent the amounts so paid may be recovered from stockholders for the benefit of creditors.

Dividends are paid only to stockholders of record and must be equal as between holders of the same class of stock. Particular stockholders may not be favored either in time or amount of payment.

§ 313. Bank Deposits

The moneys of a corporation should be deposited, in the name of the corporation, in some bank or trust company designated by the board of directors. Moneys so deposited should be drawn out only by checks, signed by the treasurer and countersigned by the president or by such other officers as may be properly authorized thereto.

§ 314. Execution of Contracts

Corporate contracts must be authorized by resolution of the board of directors. In practice, however, this rule is somewhat relaxed. The officers customarily make contracts in minor

matters incident to their official duties without express authorization. If the officers have been habitually permitted to contract for the corporation without specific authorization, such contracts, unless obviously in excess of the proper official powers, are binding on the corporation.

§ 315. Corporate Seal

The corporate seal is either provided for in the by-laws and is therefore adopted with the by-laws, or is adopted by direct resolution of the board of directors. It should bear the name of the company, the state of incorporation, and the year in which the incorporation was effected.

CHAPTER LII

INCORPORATION [1]

§ 316. Application for Incorporation

In former days a grant of a special charter would be made to specified persons, authorizing them to conduct some particular enterprise under the corporate form. Usually these charters conferred some franchise or special privilege, as the right to erect a toll bridge, establish a bank, construct a railroad, or build a dam.

The abuses arising from this method of granting charters have resulted in most states in the establishment of general laws under which corporations may be formed for any legitimate purposes, by any qualified persons upon compliance with prescribed formalities. In some few states special charters are still granted on occasion.

The form of application for a charter under these general laws is usually merely a copy of the charter desired. The charter application when allowed becomes itself the charter. It sets forth the names of the applicants and the name, purposes, and other required details of the projected corporation. It is executed by the incorporators, and, after its allowance by the Secretary of State, is filed in his office. It must also usually be filed in the office of the clerk of the county in which the corporation is domiciled or has its home. If the proposed corporation is for proper purposes, if all fees have been paid, and the application is in due form, it is accepted and filed as a matter of course, and the parties are then authorized to proceed with the organization of the corporation.

[1] For incorporation forms, see Chapter LXXXVII, Forms 42-46.

§ 317. Incorporators

The parties applying for a charter must be competent persons of full age, and ordinarily some proportion of them must be citizens of the state in which the application for charter is filed. Minors, firms, or corporations, and generally persons not able to contract, are not competent parties, though they may usually hold stock after the corporation is formed. The minimum number of applicants is in most states three, though in some few states five are required. Each incorporator must ordinarily subscribe for one or more shares of stock and all must sign and acknowledge the application.

§ 318. Name of Corporation

Names like, or nearly like, those of corporations already rightfully doing business in the particular state may not be selected as the corporate name. In some states all corporate names must begin with "The" and end with "Company." In others the name must be followed by "Limited" or "Incorporated." In many states firms may become incorporated under the partnership name without change or addition of any kind.

§ 319. Purposes

The purposes for which a corporation is to be formed must be set forth in the application. They must be permitted by the laws of the particular state. Ordinary business corporations are allowed much latitude in stating their purposes and are not usually confined to one business or line of activity. (See Chapter XLVII.)

§ 320. Capitalization

The capital stock of the proposed corporation must be specified in the application and may be changed thereafter only by amendment of the charter. (See § 282.)

§ 321. Shares

In most states of the Union the par value of shares of stock may be fixed by the incorporators at discretion. In some few states there are general restrictions, as in New York where the par value of the share must be not less than $5 nor more than $100. In some states shares may be issued without par value, their value being the market rate. (See § 287.)

One hundred dollars is the most convenient and most generally adopted par value for shares of stock. (See § 282.)

§ 322. Location

A corporation must have its principal office in the state in which it is incorporated. The location must usually be specified in the application for its charter.

In the state of its incorporation the company is a "domestic" corporation. Elsewhere it is a "foreign" corporation. In its own state it has certain legal rights as an incident of incorporation. In other states it has no such rights except as a matter of courtesy or as may be granted there by legislation.

§ 323. Duration

In some states the duration of corporations is limited to some fixed maximum as twenty, thirty, or fifty years. In most states, however, while a corporation may be limited to any term specified by its charter, it is permissible to make its duration perpetual.

§ 324. Number of Directors

The number of directors of the corporation must in most states be specified in the charter application. The minimum allowed by law is usually three. (See § 303.)

§ 325. Classification of Stock

Under the laws of most of the states, stock may be classified in various ways. The most common classification is into

common and preferred stock. Another common classification is that of voting and non-voting stock. Sometimes stock is classified so that each class of stock elects one or more directors. (See § 289.)

§ 326. Cumulative Voting

The cumulative system (see § 300) is employed only in the election of directors.

§ 327. Execution of Certificate

The charter application, having been duly made out in conformity with the laws of the state of incorporation, is signed, usually in duplicate, by the incorporators. It is then acknowledged before some officer authorized to take acknowledgments to deeds, and is ready for filing.

§ 328. Filing and Recording

Under the usual procedure, the duly executed application, accompanied by the proper fees, is sent to the office of the Secretary of State, while another copy is filed with the county clerk of the county in which the proposed corporation is to have its principal office. Each state has its own minor variations in procedure, which will be found in its statute law.

In New York the state fees must be sent to the State Treasurer. When these fees are received, the Treasurer certifies that fact to the Secretary of State, and this latter official will not file the charter until this certification is received. In New Jersey the application is filed with the county clerk first, and a copy certified by him is then filed with the Secretary of State. In some states, the application must receive the approval of the judge of a specified court before it will be filed.

If the application for charter is in due shape and all fees are paid, it is accepted and filed as a matter of course. The application becomes, when filed, the charter of the corporation. The existence of the corporation dates from such filing.

Part X—Personal Property

CHAPTER LIII

PROPERTY RIGHTS

§ 329. Origin of Property

The natural right to property arises either from occupancy or labor. A man settled on unclaimed land, cultivated it, and built a house on it, and it became his. Men caught wild animals and tamed them, and by so doing became their owners. After the first taking, the right to the particular property could be acquired by another person only by transfer, that is, by gift or sale, from the man who originally owned it.

The other origin of the right to property is in labor. A man caught fish, killed game, made a war club, or raised crops; and the law recognized his natural right to what he had acquired by his own labor.

Other less defensible means of acquiring property have prevailed and the law has recognized the titles despite their wrongful origin. Much real property has at some time been taken from its original possessors by conquest. Title so acquired has passed from hand to hand, has been sold, or has been inherited, and now the law recognizes as good the title that had its origin in violence and robbery. Other property rights originated in fraud and deceit, but human law cannot well dispossess the present occupants who, in most cases, have acquired title in good faith.

§ 330. Right to Real Property

Under certain established rules, land or real property may be held or owned by private citizens. It may be bought, it may be inherited or transmitted by will. If one can occupy unclaimed land long enough and escape dispossession by someone who advances a prior claim, he can still get a title by occupancy. It is now recognized, however, that the right of the owner is always subject to certain rights possessed by his neighbors and the public. A man cannot keep a pig-sty or run a glue factory on his premises in the midst of a crowded city. In some cities there is a limitation on the height to which buildings may be erected. Also, there exists what is known as the power of eminent domain, that is, the power inherent in the government to take private property for the use and benefit of all, as in the building of roads or railways. In such cases, the owner is compensated, but he cannot prevent the action of the government. Finally, the state has the power to tax, and may some day carry this to such an extent as to take away the entire private value of the land.

§ 331. Rights to Personal Property

Personal property is of two kinds, tangible (that which may be touched), such as goods, chattels, commodities, etc.; and intangible, for example, a copyright. Intangible property may be either certain rights in real estate, such as a right to cross another's place (see § 353), or rights of action against other people, that is, rights to money or property evidenced by bills, notes, stocks, bonds, etc. The rights to trade-marks, patents, etc., are other examples of intangible personal property. All of these may be owned, sold, and transferred.

§ 332. Rights Classified

Property rights may be either present rights based on actual possession of the property at the time, or they may

be future rights. If future rights are certain, they are known as vested rights; if they are dependent on a condition, they are called contingent rights.

Vested Rights. Where a person has an absolute right at the present time to property which he will receive at some time in the future, it is known as a vested right. For instance, a man may die and leave his house and lot to his wife during her life, and to their son upon her death. The son will not be the absolute owner of the property until his mother's death; but his mother will surely die some day, and either he, or if he be dead, his heirs, are certain of obtaining the possession of the property then. So he is regarded as having an absolute or vested right to the property.

Contingent Rights. But if it were not certain who would take the property until the time for taking it arrived; or if the person is known but his taking the property depends on some future event, so that his right to the property is dependent on a condition, or several conditions, as the case may be, then the right is known in law as contingent. For instance, a man might leave his property to his wife for life and to those of his children who might be living at her death. It would be impossible to say just which children would get the property until her death took place. The interest of each child would be contingent.

CHAPTER LIV

CHARACTERISTICS OF PERSONAL PROPERTY

§ 333. Personal Property Defined

Personal property consists of tangible things of all sorts, such as grain, wool, sheep, cattle, cloth, tools, etc. It also consists of leases of real property and all rights in real property which are of less dignity (not less duration) than a life estate. (See § 347.) In this connection, it would be well to state that in legal estimation a lease or estate for any fixed time, even for a thousand or two thousand years, is considered of less dignity than a life estate. Any interest in real property which is measured by years is regarded as personal property. The only exception to this is what are known as easements. (See § 353.)

Personal property includes goods and chattels and also what are legally termed *choses in action,* that is, rights of action, or anything which would give one a right of action against another for money or property. A debt is a chose in action. A promissory note, a bill of exchange, a corporate bond, or share of stock gives a similar right of action and is known as a chose in action. A right of action for damages to real property is a chose in action. A right of action for personal injuries is peculiar to the person injured and may not be assigned. It is therefore not regarded, strictly speaking, as a chose in action, though it is a property right belonging to the person who has a right to bring the action.

Patents, trade-marks, and copyrights are also choses in action and personal property. They are valuable forms of

property which give one a right of action to protect his exclusive right to sell his own inventions.

§ 334. Real Property Defined

Real property, on the other hand, consists of land, or of any estate in land which is to last for one's own life or that of another, or of what are known as easements. These are rights to some profit or beneficial use which one may have in or over the estate of another. (See § 353.)

§ 335. Questionable Cases

Generally, it is easy enough to distinguish real from personal property. The difficulty arises when one considers such things as growing trees, plants, etc., that are fastened to the soil itself. The law has decided that all plants that have to be planted every year and are produced by man's labor shall be considered personal property, even while they are still attached to the soil. (See § 346.) Trees while growing are real estate; when severed by act of man they are personal property.

§ 336. Fixtures

Houses and buildings are regarded as part of the land and are real property. Every portion of a building, therefore, which cannot be removed without destroying or injuring the building is also part of the real estate. If machinery is built into a factory, it is part of the factory, and cannot be removed from it. On the other hand, gas and electric light fixtures which can be removed without any injury to a house or building are regarded as personal property, and a tenant who puts them in may take them away with him when he leaves. If they are put in by the owner of the building, they become a part of the building and cannot be removed by tenants.

Movable articles which are absolutely necessary to the

use of the building, such as keys, are also regarded by the law as part of the real estate. A fence is part of the real estate, and if posts have been cut and laid out for building or repairing a fence, they are considered to be a part of it already and are real estate.

CHAPTER LV

TITLE TO PERSONAL PROPERTY

§ 337. Original Title

The origin of the right to personal property is in either occupancy or labor. A man has a right to take a wild animal or a fish, seaweed, or anything still in a state of nature and which belongs to no one else. By the act of taking the article it becomes his, and the law will protect him in his right.

The right to property through labor may be of two sorts. Where a man works for another, he earns wages for his services. The wages which he receives are his property, but the results of his labor belong to the man who is paying for them. On the other hand, where a man not working for another, by his labor produces something, he has a right to what he has produced. For instance, where a man writes a book, invents a labor-saving device, designs a dress, or draws up plans for a public building, the book, the device, the design, or the plans are his own property.

In the same way, the right to property may be acquired through discovery. If a man should discover a buried treasure left behind by Captain Kidd or some other pirate, the treasure would become his. When lost property is found it belongs, of course, to the true owner if he can be discovered. If he cannot, the finder has a right to the property. The owner of lost or stolen property may reclaim such property from its possessor even if the latter, not knowing it had originally been stolen, paid a full price for it.

Notes:

1. Never buy personal property where there is a doubt as to the seller's title.

§ 338. Derived Title

Most of our rights to personal property nowadays, except those that come from our own labor, come to us by title derived from someone else. We either buy property or have it given to us by someone else. Our right to it is then derived from the former owner.

Property may be bequeathed by will, transferred by actual gift, or acquired for a consideration. Where the state gives the right to property to anyone, it is known as a grant. In England, all gold and silver mines belong to the king, and he grants them to whom he wishes. When a person dies without leaving a will, his personal property is distributed to such of his nearest relatives as are legally entitled to it. Those who receive it in this way take title by descent. When personal property is left to anyone by will, the person receiving it takes it as a legacy and is called a legatee.

Notes:

1. Generally, only an executor or administrator appointed by the court has the right to sell personal property belonging to the estate of a deceased person.

§ 339. Accession

Another way of acquiring title to personal property is by what is known as accession.

Accession is the addition made to property, either by natural increase as in the case of flocks and herds, or by increase of its value through labor, or by annexation, as in the case of attaching fixtures to realty. The addition, whatever it may be, belongs to the owner of the principal piece of property, even though the material added may be of a great deal more value than the thing itself. A piece of machinery might be entirely rebuilt and would still belong to the original owner of the machinery.

If A takes some of his own property and some of B's innocently, through a mistake, and by his labor combines them into an entirely new article, the new article belongs to A, although B's property put into the new product was of a great deal more value. Even though the original property belonged entirely to B, if A has made an entirely new thing of it, the same law of possession holds true. For instance, if A should take some wood belonging to B and make it up into boxes or ladders, etc., the boxes or ladders would belong to A. Of course, he could be compelled to pay for the materials that did not belong to him. If, on the other hand, A knew that the property did not belong to him, the new article will, as a usual rule, belong to B who owned the property from which it was made.

§ 340. Confusion

Sometimes property belonging to two or more different people becomes mixed together so that it is impossible to distinguish it. This is called confusion of goods. If the confusion happens by mistake, each party is entitled to a share as nearly equal to his original share as it is possible to estimate. If one of the parties deliberately brought about the confusion, he may secure what belongs to him only if he can clearly and unmistakably prove the amount to the satisfaction of the court. If he cannot, the whole belongs to the innocent party.

§ 341. Kinds of Ownership

Personal property may be owned entirely by one person, or it may be owned by two or more persons jointly or in common.

Ownership in Common. A right to property in common means that the two or more owners enjoy the use of the property together during the lifetime of all of them; and upon the death of any one of them, those who the law says are

entitled to his estate have a right to come in and enjoy his share of the property together with the surviving owners. If they wish at any time to divide their shares, they may either agree among themselves to do so or resort to an action at law to have it divided for them.

Joint Ownership. When the ownership is joint, both of the persons enjoy the property so long as both remain living, and upon the death of either the whole property goes to the survivor. This right of the survivor to take the whole property is peculiar to joint ownership and differentiates it from ownership in common. On this account personal property is rarely held jointly.

Partnership Ownership. Partners are not tenants in common. Any property used in the firm business is partnership property and is held by the firm. (See Chapter XLIII, "Partnership Property.")

Notes:

1. It is rarely that any common or joint ownership of personal property is satisfactory to both parties. The sooner, in such cases, the property is divided or sold or one party is bought out, the better the prospect for continued friendship.

CHAPTER LVI

TRANSFER OF TITLE TO PERSONAL PROPERTY

§ 342. Gift

The person who has the right or title to personal property has also a right to transfer it to anyone else. He may give it away if he wishes to do so. He may do this either by actually handing over the property, or by making out a bill of sale for it and handing that over to the person to whom he wants to give it. If the property is not easy to handle, it is not always necessary actually to hand over the property itself. Handing a person the keys to a building, or a savings bank book, or a bill of lading is equivalent to giving the person what is in the building, or the money on deposit, or the goods called for by the bill of lading. The giving of any means by which the recipient can obtain the property is sufficient.

Gifts may be made *causa mortis,* that is, to take effect in case of the giver's death. In this case, the gift to be valid must be made at a time when the giver is in actual expectation of death. If he recovers, such a gift is revoked and does not take effect. Gifts *causa mortis* may be made in any of the ways mentioned above.

Notes:

1. When a gift is made, the fact should be clearly understood by both parties.

§ 343. Sale

The sale of personal property is a most important subject and has been treated at length in Part III of this work.

§ 344. Chattel Mortgage

Personal property may be mortgaged as well as real estate. A chattel mortgage is, in effect, the sale of a chattel with the condition that if a debt or other obligation is paid by the party who makes the mortgage, the sale shall be void and the title shall return to the party who made the mortgage. Such a conditional transfer is often made to secure a debt or loan. It is usual for the party who makes the mortgage, called the mortgagor, to retain possession of the property, and in order to protect the title of the person to whom the mortgage is made, it must be recorded in the usual office of registry for the county. The object of this record is to give notice to other people that the property is mortgaged. Unless this record is made, the person to whom it was mortgaged could not claim his rights in the property if it were sold again to an innocent third party who did not know of the mortgage. A chattel mortgage is good usually for one year, or other period stated in the local statute, but may be renewed when about to expire.

A pledge of personal property is the transfer of the actual chattel as security for a debt or obligation. A chattel mortgage saves the necessity of this actual transfer of the property and permits the mortgagor to have the use of the property at the same time that it serves as security for the loan. Any personal property that is actually in existence and is owned by the mortgagor at the time the mortgage is made can be mortgaged. A growing crop, an automobile, household furniture, or a stock of merchandise can be mortgaged.

Chattel mortgages are invariably in writing and must be recorded in order to give notice to the public. Many times a chattel mortgage is made by giving an absolute bill of sale with a clause providing that it shall become null and void after the debt secured by the mortgage is paid. The property must be described so closely that third parties can identify it. The object of the mortgage is to give notice to third parties

of its existence and this could not be done unless the description were sufficiently accurate to identify the property.

The object of the chattel mortgage is to secure a debt or other obligation. Hence, the mortgagee's title to the property does not become absolute unless he forecloses the mortgage. It is usual to provide in the mortgage that if the debt is not paid the mortgagee may sell the property. If he does not sell, the mortgagor has a right to pay the debt and interest and redeem his property. Stocks of goods are often mortgaged and in such case it is understood that the mortgagor may continue to sell from them and keep the stock replenished and apply the profits to paying off the mortgage debt. (See Chapter XC, Form 61.)

Notes:

1. A chattel mortgage must be in writing and must be recorded.
2. A chattel mortgage must conform to the local law.

§ 345. Pledge

A pledge is a transfer of the chattel as security for the payment of a debt or fulfilment of some other obligation. A person who makes a business of loaning money on the pledge of personal property is called a pawnbroker. It is not often that ordinary chattels are given as pledges except in transactions with pawnbrokers. But, it very often happens that bills, notes, stocks, and bonds are used as security for money borrowed. In such cases the term "collateral security" is generally used. Where personal property is used as security for a debt, it is usual to give a chattel mortgage.

A pledge may be the result of a written contract, but it may be made merely by transferring the property. In the latter case the pledge will remain in force as long as the pledgee retains possession of the property.

To make a valid pledge, delivery is absolutely necessary.

Bills, notes, and corporate stocks must be indorsed in blank when used as collateral security. In this case some writing should accompany the pledge in order to define its terms and prevent misunderstanding. In the case of corporate stocks the mortgagee may have the stock transferred on the books of the company and new certificates issued in his own name.

In most cases where collateral security is given, it is provided that if the debt is not paid when due the pledgee may sell the security and, after paying expenses of the sale and the debt secured, turn over any surplus to the pledgor. In such cases the pledgee, even though given the right to sell at a private sale without notice, would gain greater security by giving notice and selling at public sale, the notice given to be a formal notice in writing specifying the time and place of the sale. In many states sales of pledged property are regulated by the laws.

Notes:

1. The use of collateral security is a common business expedient.
2. The pledging of chattels is usually costly and injurious to credit.

Part XI—Real Property

CHAPTER LVII

NATURE OF REAL PROPERTY

§ 346. Definition

By real property is meant land and anything permanently attached to it.

Buildings and fences are regarded as part of the land, though they may become personal property if the owner of the land severs them from it. Things which grow of themselves or which remain year after year, such as trees, perennial plants, etc., are regarded as part of the realty, so long as they remain attached to it, but after they are cut down they become personal property. The same is true of stone, ice, etc.; after it is cut or quarried, it becomes personal property.

Crops which have to be planted every year and which are therefore the fruits of labor rather than of the land itself are personal property. (See § 335.) A tenant has a right to those crops which he has planted himself if, when he planted them, he did not expect his lease to run out before they could be gathered. He has no right to fruit and perennial crops unless they have been gathered before he is notified to give up the land.

§ 347. Estates in Real Property

A person may own real property outright. This is termed an "estate in fee simple." Or he may possess the right to it for his own life or that of another. This last is called "an estate

for life." Either of these estates in fee simple or for life is regarded as real property. If a man had a right to a piece of land "as long as A or B or either of them shall live," he would have a life estate for two lives. Any other right to the possession of land is regarded as personal property, even though it may be a lease for a term of years much longer than anyone's life.

The holder of a life estate is bound to make such repairs as are necessary to prevent the property from falling into decay, but he is not bound to make improvements, or replace buildings destroyed through no fault of his, or pay the principal of any incumbrance, though he must pay the interest. On the other hand, he must do nothing to waste the estate, such as stripping it of timber or opening new mines upon it, though he may work opened mines and cut a moderate amount of timber.

The right to land includes everything underneath it to the center of the earth except such minerals as the government may claim. In some countries, the government has a right to the gold, silver, and more valuable metals. The right to property also includes the air above the property. Before the days of flying machines, the right to the air was neither enforced nor questioned, but it is very doubtful whether a man could prosecute an aviator for trespass if he flew over his property. At any rate the owner would have to prove damages.

§ 348. Remainders and Reversions

After the life estate or life estates end, the final ownership of the property must either be given to someone else or revert to the original owner or his heirs. If the estate that is left is given to someone else, it is called "an estate in remainder"; if it comes back to the original owner, it is called a "reversion."

When the original owner is dead, the reversion comes back

to his heirs. There may be remainders and reversions even after property has been leased for many years.

Remainders and reversions involve the absolute ownership of property.

§ 349. Vested and Contingent Remainders

If the person who is to take the remainder after one or more life estates is certain, and the fact that either he or his estate will get it finally is also certain, it is known as a "vested remainder." Although he may never live to enjoy the property, his right is certain and if he dies his heirs will inherit.

If, on the other hand, the person who is to take the remainder is not certain but can only be known later; or if the remainder is left to a person who is certain, but on a condition which may never happen, the remainder is contingent. For example, a man might leave property to his son for life and after that to his grandchildren, although he had no grandchildren at the time of making his will; in such a case the person or persons who are to take the remainder would not be certain, but if any were afterwards born they would have a right to the property. Or he might leave the remainder to such of his grandchildren as were living at his son's death and it would be uncertain, until his son's death, which of his grandchildren would get the property.

On the other hand, the person who is to take the property might be perfectly certain, but the event might be contingent; as for instance, if a man should leave property to his nephew for life and the remainder to his niece if she were then living. It is certain who his niece is, but it is uncertain whether she will live to get the property.

§ 350. Executory Devises

A man cannot transmit property by means of a deed which is to take effect at some future time. The title to the property

passes when the deed is delivered; if the deed is not delivered, it is no deed at all. But he may leave it by will in this way, provided that the future time at which the title to the property is to "vest," or in other words become absolute in the person to whom it is given, is not delayed longer than the law permits.

This legal limit is usually within the time measured by the life or the lives of persons in existence at the time the will was made. For instance, a man might leave property to his infant son to be his on the death of three other persons then living. The title of the property will then vest within the period of three lives.

In England, a man named Thelluson left his property tied up for a long period, the income to be added to the principal and the interest compounded. At the end of the period the entire fortune, which would then amount to an enormous sum, was to be delivered to his heir in the direct line, which would make him the richest man in all England. The heirs who were left out took the matter to the courts and the highest legal authority in England, the House of Lords, decided that the arrangement was contrary to public policy and should not be carried out. The principle established in this case has prevailed both in England and in this country and no property can be tied up in any way except for the limited period prescribed by the law.

§ 351. Dower and Courtesy

At common law a wife was entitled upon the death of her husband to a life estate in one-third of any real property which he owned during their marriage. This right was known as dower.

If there was a child born alive the husband was entitled upon the death of the wife to a life estate, not in one-third but in the whole of the wife's real property. This right was known as courtesy. Many states have abolished both dower

and courtesy. In some states, however, a husband cannot transfer his real estate so as to cut off his wife's right of dower unless she joins with him in the deed. In New Jersey each is given a life estate in one-third of the other's real property in place of dower or courtesy. (See Chapter LX.)

§ 352. Homestead

A homestead, that is, the family residence and a certain quantity of land adjoining it, is usually exempt by statute law from all debts except mortgages, purchase money liens, and mechanics' liens. An old homestead may be given up and a new one acquired; or a homestead right may be lost by the wife signing it away in a deed. In some states any homestead, no matter how valuable, is exempt, but in others there is a limitation of value, and the excess value may be taken by creditors.

§ 353. Easements

These are rights to make use of the land of another in some way, as by a right of way over the fields of one's neighbor, or the right to restrict another from erecting buildings which shut off light and air, or the right to have a drain pipe under another's land. When these rights are included in a deed of property they follow the property deeded itself and will pass with it to any subsequent owners. For instance, a man might want to sell a lot in the middle of his farm. In order to make it salable he gives the purchaser a right of way over the rest of the farm between this lot and the highroad. This right of way, which was the inducement to the sale and is necessary to the enjoyment of the property sold, passes along with the property to the next owner. It is inseparably connected with the property and is regarded as a part of it, and hence is considered real property.

If, however, a right of this sort is given by deed separ-

ately from the property, it belongs solely to the person to whom it is given and cannot be assigned to anyone else.

Mere oral permission to go across another's property, to pick apples from his trees, etc., is a license, and the owner may take it away at any time.

§ 354. Joint Tenancies and Tenancies in Common

The word "tenancy" in legal parlance means ownership or estate in land. It is not limited to the renting of land, but means a holding for years or for life. Any estate in land may be owned by two or more persons at the same time. They hold it either in joint tenancy or tenancy in common according to the deed or instrument from which they get their title.

In joint tenancy, on the death of one of the owners, the remaining owners take the property, the entire property going to the last survivor.

In tenancy in common, if one of the several tenants dies his heirs have a right to come in to share the ownership of the property with the remaining tenants.

Joint tenants or tenants in common may divide the property between them by agreement. If they cannot agree, they may bring what is known as a partition action and have the court divide the property between them.

§ 355. Trusts

When one person holds property for the benefit of another, he is said to hold it in trust. The one who holds property is called a trustee. The one for whom it is held is called the beneficiary. A corporation formed for holding property as trustee is called a trust company.

A person may hold any of these estates except dower and courtesy in trust for another or for several others. Some states do not allow trusts which would prevent creditors from enforcing their claims against the property, except for married

women and children under age. Trusts to accumulate income for more than a limited period are also prohibited. (See § 350.) Trusts for charitable purposes of more than a certain amount of a person's entire estate cannot be created by will in many states, if the person is survived by husband, wife, or children. Many states also restrict the amount of property which a charitable organization may hold.

If a person pays the price for land and another takes the title to it, unless a gift was intended, the person taking the title holds it in trust for the one who paid for it. Or if a person obtains property from another by representing that he is going to hold it for the benefit of a third party, the law will make him a trustee for that third party.

Notes:

1. Generally it is necessary to consult a lawyer before transferring an estate in real property either by deed or will.
2. Never buy real property without finding out whether the person selling is married and, if so, whether the law requires the husband's or wife's consent.

CHAPTER LVIII

TITLE TO REAL PROPERTY[1]

§ 356. Original Title

The right to the ownership of real property was acquired in the first place by taking possession of it and keeping it. This is title by occupancy. To a certain extent this right still exists in the western part of the United States, where unoccupied lands may be taken up by living on them for a certain length of time and filing a claim with the government.

Where property has been in open and undisturbed (continuous) possession of a party under a claim of right for a certain length of time prescribed by law, generally about twenty years, and when his possession is undisputed by anyone, the possessor acquires a good title to it. This is termed "title by prescription." If any person who might have claimed the property was under age, insane, or absent from the country during any part of the twenty years, he would be allowed in addition the period of time so lost. (See § 59.)

Notes:

1. It is not safe to rely on title by prescription in buying property. There may have been something to prevent the running of the statute of limitations.

§ 357. Acquired Title

The ownership of property today is usually by title acquired from someone else. It is acquired either by deed, will, or inheritance. The formalities for a deed or will are taken up in §§ 358 and 372. A deed or will involving real

[1] For forms of deed, mortgage, and lease, see Chapter XC, Forms 62-64.

property must conform to the laws of the state where the real estate is located. When real property is left by will, it is said to be devised and the person who so receives it takes by devise.

Inheritance. Where a man dies leaving real property and without making a will, the law determines which of his relatives shall take the property. Their title is acquired by inheritance. If he leaves children, grandchildren, or great-grandchildren, they have the first right to the property. If a man dies without children, leaving his father surviving him, the father takes the real estate. If his father is dead, the property is divided between his mother, brothers, and sisters. Grandparents may take by inheritance if none of the relatives mentioned above are left surviving; or if grandparents are dead, uncles and aunts may inherit.

In all of these cases, if a man leaves a wife surviving him, she is entitled to her dower right in one-third of the real property for life. The other relatives take their rights in the property subject to the wife's dower right and have but two-thirds until she dies. In most states the laws of inheritance are as given here. (See § 367.)

Notes:

1. The laws on inheritance differ to some extent in the various states. In order to determine who are a man's heirs it is necessary to consult the statutes, and the same is true as to how property may be transferred by will or deed.

CHAPTER LIX

TRANSFER OF REAL PROPERTY

§ 358. Conveyance of Real Property

A sale of real property must always be carried out by means of a document called a deed signed by the seller. If signed by an agent, the agent should be authorized in writing to act for the seller. The seller or vendor is designated as the grantor, and the buyer as the grantee.

Real property is conveyed by a deed in writing. The deed must contain a full and accurate description of the property by metes and bounds; it should state from whom and in what manner the grantor obtained the property; and if conveyed to him by a deed, where the former deed is recorded. The deed must be signed and acknowledged before a notary, justice of the peace, or a commissioner of deeds by the party giving the conveyance, and by the husband or wife of the party if the law of the state requires this formality in order to cut off dower, courtesy, or homestead rights.

A deed should also be under seal. This today is a pure formality. Red wafers are generally used. In New York State the letters (L. S.), standing for the Latin words *locus signalis*—"the place of the seal"—which were originally used to designate the place to affix the seal, are enough.

In order to take effect, the deed must be delivered into the hands of the person to whom it is assigned or into the hands of an agent whom the assignee has authorized to receive it.

There are two kinds of deeds in general use—quitclaim and warranty. A quitclaim deed merely releases the rights which the grantor has in the property, whatever those may be.

In a warranty deed, the seller when conveying the property warrants that the title is free from all defects which might disturb the purchaser in the enjoyment of the property later, and that the grantor will protect the purchaser in his rights and execute any further instruments that may be necessary to secure them.

Where the person giving the deed wishes to convey the property outright and to give absolute ownership, the words "to him and his heirs forever" *must* be used. On the other hand, if he wishes to convey only a life estate or other limited interest, these limitations must be clearly stated, or the grantee will take the same interest that the grantor had in the property. (See Chapter XC, Form 63.)

§ 359. Record of Deeds

A deed which has been delivered is good as between the two parties concerned, the seller and the purchaser of the property, but in order to make the purchaser's right good against all claims the deed must be recorded. It is usual for each county to have an office for the recording of all deeds affecting real property located in that county.

It is of vital importance that a deed be recorded. If a deed is not recorded and the seller executes another deed which is filed, the holder of the first deed has no claim to the land. All he can do is to bring suit against the seller for damages. The record of a deed is absolutely essential to give a good title to the holder.

§ 360. Restrictions in Deeds

Restrictions in deeds are generally made for the benefit of the surrounding property. They are legal and binding as long as they are not against public policy; for instance, a restriction for the purpose of creating a monopoly or restricting competition would be illegal. Usually such restrictions relate to

the character of buildings which may be erected in a certain locality.

If the deed provides that in case the grantee violates the restriction, the property is to revert to the grantor or his heirs, then any such violation destroys the right of the grantee; if the deed does not so provide, damages must be paid for breach of the agreement but right to the property is retained.

If the restrictions are intended to benefit the surrounding property, any of the owners of that property may enforce them. They remain restrictions on the land even when it is transferred to another owner. An owner who violates the restrictions cannot plead that they are not mentioned in the deed. If the character of the neighborhood materially changes so that the restrictions become unreasonable, the courts will as a rule permit the violation to be settled by the payment of damages, even though the original deed provided that the property was to revert to the grantor or his heirs if any of the imposed restrictions were violated by the grantee.

§ 361. Searching Title

A purchaser of property should always insist on a warranty deed for his own protection, unless the circumstances are such that he is willing to take the property even at the risk of further expense to protect his title. Any restrictions in earlier deeds continue to affect the land even in the hands of a later owner. The possibility of defects in the title of, or existing claims against, any property is also always present. Therefore, the purchaser of real estate should always have the title examined to make sure that his right is incontestable and that he is likely to remain in undisturbed possession.

This search may be most effectively made by one of the numerous companies whose business it is to examine such titles with a view to insuring their validity. As specialists in this complicated legal work they can quickly form a reliable opinion

as to the validity of any title to property within a given locality. In many cases it is advisable to have the title guaranteed by some one of the title guaranty companies.

A method of guaranteeing any title, called the Torrens System, is used in Australia. This system has been adopted in some states in this country. Under the Torrens System in New York, any person having an interest in the property may bring a proceeding to register the title. He must prove to the court that his title is good. Once registered, the state guarantees the title and any subsequent changes in the state of the ownership, etc., will be recorded on the registry, saving further searches.

§ 362. Mortgage of Real Property

A mortgage of real property is given as security for the due payment of a note or, more generally, a bond. It is in form an instrument like a deed, assigning the property in question to the man who has loaned the money, but providing that if the money is repaid when due, the assignment shall be null and void. Sometimes an absolute deed of land is given to secure the payment of money; in such case the deed is in reality a mortgage and may be so proved.

The possession of the property remains in the hands of the mortgagor (the person who executes the mortgage), and the mortgagee (the person who loans the money) has the right to foreclose or take possession of the property if the mortgagor does not live up to his agreement. The collection of interest on a mortgage must be provided for in the written agreement.

Form of Mortgage. A mortgage is in form a deed of the property from the mortgagor to the mortgagee. (See § 358 and Form 64.) If the conditions named in the deed are fulfilled it will become of no effect; if the conditions are not fulfilled, the mortgagee will have a right to foreclose. The

mortgage should be under seal and should be recorded in the office for the registry of deeds in the county where the property is located. When paid, a satisfaction piece stating in simple terms that the mortgage has been paid and referring to the page of the record where it is recorded should be filed with it. In New York, the original mortgage should be brought back with the satisfaction piece and left on file for ten years.

When the mortgage does not provide that the property may be sold in one piece, if the property is divided into lots or parcels, each lot or parcel must be sold separately on foreclosure.

Mortgageable Property. Any property or interest in property which may be assigned may be mortgaged. This includes, of course, any tangible property. It also includes interests in property which will mature only in the future. Even if they are interests which may never take effect, such as contingent remainders (see § 349), in some states they may be assigned and mortgaged.

§ 363. Foreclosure

The term "foreclosing a mortgage" implies that legal steps are to be taken to sell the property and to apply the price realized to the payment of the debt. If more is realized by the sale than is necessary to pay off the mortgage, the interest due, and the expenses of the enforced proceedings, any surplus belongs to the mortgagor. If there is a deficit, the mortgagee may sue the mortgagor on the bond and collect what remains unpaid. Usually both bond and mortgage are sued on together.

Up to the time the property is sold the mortgagor has the right to redeem it from sale by paying the amount of the mortgage, the interest, and the expenses up to the time of the foreclosure. This right of the mortgagor is termed his "equity of redemption."

If the property is transferred it remains subject to the

mortgage, but the new owner does not become responsible for the payment of any part of the debt which the price of the property on the sale fails to cover. The original mortgagor still remains responsible. He may protect himself by giving notice to the mortgagee to foreclose when the mortgage falls due, or by offering to pay and to take an assignment of the mortgage.

Method of Procedure. The first step in a foreclosure is to file notice of the suit (a so-called *lis pendens*) in the office where the mortgage is recorded. This warns all third parties; and as a result any possible rights which they may claim in the property or later acquire will be subject to the prior claim of the mortgagee as established by the suit.

When bringing a foreclosure suit, all persons interested in the property must be given notice to defend their interests. This is done in order to give them opportunity to protect their rights in the property or in the surplus proceeds if there be any. Persons who hold liens against real property are required to record them if they wish to protect their rights as against third parties. An examination of the books in the offices of record in the county where the mortgage is recorded will reveal the names of any such persons.

If the property is leased, tenants should also be made parties defendant to the action, since possession is considered interest in the property and possession under an unrecorded deed is good notice of a possible ownership.

§ 364. Kinds of Mortgages

Deeds of Trust. Mortgages may be given by a deed in trust to a third party as trustee. This is the usual rule with corporate mortgages. These are called "deeds of trust." The trustee has the right to foreclose. If he fails to exercise his right, a bondholder may bring foreclosure for the benefit of other bondholders on showing the court that the foreclosure is

necessary to protect their interests and that the trustee refuses to take action.

Purchase Money Mortgages. These are mortgages given for part or the whole of the purchase price of land. They take precedence of every other claim against the property. It is not necessary for a wife to join in a purchase money mortgage in order to cut off her right of dower. The mortgage is attached to the property before it becomes the property of her husband, and she is entitled to dower only in what may remain to her husband after the mortgage on the property is paid off, or in his equity of redemption which will be his share of the purchase price of the land on foreclosure sale. The mortgage may be given either to the person from whom the land is bought, or to a third person.

Building and Loan Mortgages. Building and loan mortgages are frequently given to secure funds for erecting a building. The money is paid over in instalments as the building reaches certain stages. Interest may be charged on each instalment only from the time it is paid over; but the mortgagee may deliver the whole amount to a trust company to be held and paid over as the instalments fall due. Full interest may then be charged, deducting the amount which the trust company allows on the deposit.

Sundry Mortgages. Corporate mortgages can be given only with the consent of two-thirds of the stockholders. Guardians and trustees may give mortgages only with the court's permission; they, as well as such institutions as savings banks, are also restricted in the kinds of mortgages which they may accept. In New York, savings banks may hold mortgages only on improved real property worth at least 50 per cent more than the amount of the mortgage. Trustees and guardians are limited to the same kinds of investments as savings banks.

If an executor or an administrator gives a mortgage, the agreement binds only himself personally and not the property

of the estate, unless the executor is given power to mortgage in the will.

Contract to Mortgage. This must be in writing and signed as a contract for a deed (see § 358). The mortgagee can compel the mortgagor to carry out his contract and to give him a mortgage on the property, because his agreement concerns real property; the mortgagor, on the other hand, has a right to damages only in case the mortgagee fails to carry out his agreement.

Notes:

1. Everything necessary to keep the property in good shape, such as payment of taxes, repairs, etc., should be provided for in the mortgage, with a proviso allowing the mortgagee to foreclose if the payments are not kept up; and it should be provided that in case any suit is brought against the mortgagor concerning the property, he will have the mortgagee brought into court to protect his rights.
2. A mortgage should always state what other claims there may be against the property at the time the agreement is made. If the property is sold on foreclosure and the purchaser is not informed in regard to these claims, if any, he may refuse to take the property. If they are indicated in the mortgage they cannot be overlooked when the sale is made.

§ 365. Lease of Real Property

A lease of real property gives the right to its use for a certain length of time in return for rent. A lease may be at will; that is, no definite time may be fixed for its termination, but in that case the landlord may bring it to an end when he wishes; or it may be for a fixed period, such as a year, or a

month. At the end of the period the lease ends. If the tenant remains in possession of the property, the landlord may regard him as a trespasser and request him to leave, or he may permit him to remain and may accept rent, in which case a new lease is implied for the same period as the old one.

If the tenancy was from year to year, the new lease will be for a similar period. In case of such a lease, either party must give the other six months' notice in order to terminate the lease. This was the common law rule. In many states this has been changed by statute and only three months' or sixty days' notice is required. If the lease ran from month to month, then thirty days' notice is sufficient. The notice must be given the required period before the end of the year, or thirty days before the end of the month—otherwise the lease will run over for another year or another month. A lease can be ended only at the close of the year or the month.

Parties to a Lease. The parties to a lease are the landlord—the owner who lets the property—and the tenant who rents. The tenant is obliged to pay rent and to keep the property in as good condition as received, reasonable wear and tear excepted. Where the landlord is responsible for the maintenance of hallways, basements, etc., as in an apartment house or an office building, he must keep them in usable and safe condition. Otherwise, he is not bound to make repairs unless it is provided that he shall do so in the lease. But if there is any defect in the property which could not be discovered on examination at the time when the lease was signed and of which the landlord knew, such, for instance, as impure drinking water, which only experts could detect, the landlord is liable in damages and the lease may be treated as broken.

Rights of Tenant and Landlord Under Terms of Lease. If the tenant fails to pay rent or breaks any other agreement in the lease, the landlord may evict him. If the landlord accepts any of the rent due after the tenant has broken the lease in this

manner, he cannot put him off the premises, but may bring suit to collect the remainder of rent or for damages. In New York the landlord must give the tenant a few (usually five) days' notice before eviction.

If the landlord takes possession of a whole or part of the premises during the term of the lease, this is equal to eviction and is so called. Such procedure constitutes a breach of the lease on the landlord's part and the tenant need not thereafter pay rent. If the tenant is evicted from part only of the property, he may remain on the rest of it and refuse to pay rent.

If the landlord permits anything which renders the property uninhabitable, such as insufficient heat in an apartment house, this is termed a constructive eviction. The tenant has then the right to move out and refuse to pay any more rent; but if he remains he must pay. If the tenant supplies the heat himself or makes repairs which the landlord should have made under the lease, he may collect the money he has spent from the landlord; but if such expenditures are deducted from the rent this procedure gives the landlord the right to terminate the lease.

The tenant has no right to utilize the resources of the property, except wood used to make necessary repairs. If there are developed mines on the land he may work them unless forbidden by the lease, but he has no right to open mines. He has a right to fruit, grass, etc., which ripens or is cut or picked before the lease runs out, and a right to any crops which he has planted himself if he has reason to expect that they will be ready to be gathered before the lease expires.

Expediency of a Written Agreement. A lease must be in writing if for a longer term than a year. In some states it need not be in writing unless it is to run for three years or more and need not be under seal. A written agreement, however, should be made whether the statute requires it or not, and should state whose duty it is to make repairs, and what notice

shall be necessary to terminate the lease. If the landlord does not want the premises sublet, he must see that a provision against subletting is included.

Unless forbidden in the lease, the tenant may sublet either the whole or a part of the premises. He remains responsible to the landlord for the payment of rent and for the relinquishing of the property in as reasonably good condition as received.

In every locality landlords have printed forms of lease and tenants are rarely in a position to insist on any variation of terms.

Notes:

1. The tenant is at a disadvantage and must depend largely on the landlord's character for fair dealing.

Part XII—Wills and Inheritance

CHAPTER LX

DISTRIBUTION OF PROPERTY AFTER DEATH

§ 366. Dying Intestate

If a man dies without making a will, he is said "to die intestate," and the law will distribute the property he has left after his death to those people whom it considers entitled to it. These are his closest relatives. The law is different with regard to the distribution of real property and personal property.

§ 367. What Will Become of Real Property

In the State of New York, if a person dies intestate leaving real property, the law will dispose of it in the following manner:

1. *Leaving children but no husband or wife*:
   - (a) If all are living, each one gets an equal share.
   - (b) If some are living, and some are dead, the property will be divided into as many equal parts as there are children living, and children who have died but left children, and
     - (1) Each living child gets one of the equal parts.
     - (2) The share of each dead child is divided equally among his or her children.
     - (3) As to adopted children see § 396.

If any children have died leaving no children, the property is divided as though they had never existed.

To illustrate, if the deceased had four children, the first of whom had died childless, the second of whom had died leaving one child, the third of whom had died leaving two children, and the fourth of whom was living, his property would be divided into three equal parts, completely disregarding the first who had died childless. The child of the second would receive one share, the two children of the third would each receive half a share, and the fourth, the surviving child, would receive one share.

Legally adopted children have the same rights as one's own children.

2. *Leaving grandchildren, but no children*:
   (a) If all are living, each one gets an equal share.
   (b) If some are living and some are dead, the property is divided in the same way as in the paragraph above, and
      (1) Each living grandchild gets one of the equal parts.
      (2) The share of each grandchild who died leaving children is divided equally among his children.

What applies to children applies also to grandchildren who have died leaving no children. (See paragraph above.)

3. *Leaving great-grandchildren, but neither children nor grandchildren*:
   The same thing follows as in the case of children and grandchildren, as given above.

4. *Leaving no children, grandchildren, or other descendants*:
   (a) If the deceased's father and mother are both living, generally speaking all the property goes to de-

ceased's father unless it came to him or her from the mother's side.

(b) If the deceased's father is dead and mother living, she usually gets the use of the property for life, and after her death it is divided among deceased's brothers and sisters.

(c) If the deceased's father and mother are both dead:

(1) The property is divided equally among deceased's brothers and sisters; the share of any brother or sister who is dead leaving children being divided equally among his or her children in the same manner as explained in paragraph 1-b.

(2) If there are no brothers or sisters, the property is divided among nieces and nephews and their children in the same way, and so on down through grandnieces and grandnephews, great-grandnieces and great-grandnephews, etc.; except that property which came to the deceased from the mother's side will be divided among uncles, aunts, and cousins on the mother's side, if there are any; property which came to the deceased from the father's side will be divided among uncles, aunts, and cousins on the father's side, if there are any, in the same way.

(2) Where there are no uncles, aunts, nor cousins of any degree, the grandparents take it. If the property came from the mother's side, the grandparents on that side take it if they are living; if from

the father's side the grandparents on that side in the same way; if from neither, it is equally divided among all surviving grandparents.

Half brothers and sisters, and uncles and aunts who were half brothers or sisters of the parents of the deceased will take the same shares as whole brothers and sisters, uncles and aunts.

If a man dies intestate, leaving a wife, she will be entitled to the use of one-third of his real property during her life. This is known as the right of dower. Other persons who inherit must allow her this right, or pay her an equivalent in money. (See § 386.)

If a woman dies without leaving a will, and she has had children, her husband will be entitled to the use of all of her real property during his life. This is known as the right of courtesy. The children can take the property only after he is dead. If there have been no children, the property goes to the relatives first named. (See paragraph 4 above.)

If a person dies intestate without leaving any relatives his or her property goes to the state.

When, during his lifetime, a person has transferred real or personal property to any children, the amount of the advancement will be subtracted from the share which is given the child at his death so that all the children in the end may share alike in the property. The law regards the person who is dead as having made the transfer as an advancement of the share which the child would have received at his death. Not all gifts or sums of money, however, which are given to a child are accounted as advancements. Advancements are sometimes a cause of contention and ill-feeling.

The above statements are based on the inheritance law of New York. Other states follow the same general lines, but may differ in some particulars and the statutes should be con-

sulted. The law of the state where real property is located always governs the disposition of the property.

§ 368. What Will Become of Personal Property

If a resident of New York dies without making a will, his personal property will be distributed in the following manner, depending on which of the relatives mentioned is left:

1. *Leaving a husband or wife and children*:
   One-third goes to the husband or wife, and the other two-thirds are divided equally among the children. The shares of any children who are dead are equally divided among their children in the same way as in the case of real estate. (See paragraph 1-b in § 367.)
2. *Leaving children but no husband or wife*:
   The property is divided among the children equally, the children of any who are dead receiving their parent's share which is equally divided among them.
3. *Leaving a wife but no children*:
   (a) If the deceased's father is living, the wife gets one-half the property; the father, the other half.
   (b) If the deceased's father is dead:
      (1) The wife gets one-half and the other half is divided equally between the deceased's mother and brothers and sisters. If any of these is dead, his or her share goes to his or her children in equal parts. (See paragraph 1-b in § 367.)
      (2) If deceased has no brothers and sisters, but has nephews and nieces of any degree, the other half is divided equally between the deceased's mother and such nephews and nieces. The share of a

nephew or niece who has died is divided equally among his or her children in the same way as explained under paragraph 1-b of § 367.

(3) If deceased leaves neither brothers nor sisters, nephews nor nieces of any degree, the wife takes one-half and the mother the other.

(4) If deceased leaves neither father nor mother, brothers nor sisters, nephews nor nieces, the wife gets the entire property.

4. *Leaving a husband but no children*:

The husband takes all the estate. This is the old common law rule, and applies because no state legislature has changed it.

5. *Leaving no husband, wife, or children:*

(a) If deceased's father is living, he gets the whole property.

(b) If deceased's father is dead:

(1) The property is equally divided among deceased's mother, brothers, and sisters, and the children of such as are dead; or, if there are no brothers and sisters, between deceased's mother and nephews and nieces of any degree and the children of such as are dead, in the same way as explained in 1-b of § 367.

(2) If there are no brothers or sisters, nephews or nieces of any degree, then deceased's mother receives the whole.

(3) If deceased's mother is dead too, the property will go to uncles and aunts, or, if

none be living, to cousins of any degree or to grandparents. In the case of these relatives, if any have died leaving children, the children do *not* receive a share. The property is divided among those who are living.

Where a person dies intestate leaving no relatives at all, any personal property which came to the deceased from a deceased husband or wife will be distributed among the deceased husband's or wife's surviving relatives in the manner illustrated above. Any which did not so come will go to the state.

Half brothers and sisters are counted as own brothers and sisters, and uncles and aunts who were half brothers and sisters as fully related.

This distribution of personal property is in accordance with the law of New York. In other states it is important to consult the local laws as to the distribution of personal property, as they differ greatly. Personal property is always distributed according to the law of the state of which the deceased is a resident. A wife's residence is her husband's residence even if she is actually living apart from him, unless she has had a legal separation, a divorce, or good grounds for either. (See § 393.) The residence of a person under twenty-one is his father's residence; or his mother's, if his father is not living. If his mother has remarried, the child's residence does not change but remains in the state in which his mother was living before she remarried.

§ 369. Is it Wise to Make a Will?

As a general rule it is better. In most cases a person can distribute property more justly and provide more generously for those who need his help than can be done by the general rules of the law. Even if a person is satisfied with the disposition which the law makes of his property, he can, by

making a will, save his surviving relatives trouble and expense. If there is any personal property to be distributed or any debts to be paid, it will be necessary for someone to take out letters of administration and the person taking them out will be obliged to give a bond in double the amount of the property, which means expense and trouble. A person may provide in his will that his executor may serve without giving a bond.

Whenever there is no will the law gives the administration of the estate to the nearest relative who is willing to take it, a surviving husband or wife coming first in order. In many cases it may be preferable to select some other person of superior business ability to take charge of the estate. If this is done the consent of the party to serve should be first procured, as he may refuse and the administration of the estate will then come back to the person whom the law selects, even though there is a will.

A trust company may act as executor and in many cases this is more satisfactory than the designation of an individual.

Notes:

1. If the person to whom you are going to leave the bulk of your property is a person of integrity and fair business ability, it is advisable to name him as executor. Persons not interested in the estate are apt to shirk the responsibility, especially if they are required to go to the expense and trouble of procuring bonds.

CHAPTER LXI

HOW TO MAKE A WILL[1]

§ 370. Who Can Make a Will

Persons under age cannot make a will, except of personal property. Generally at the age of eighteen, or at an earlier age in some states, one may make a will of personal property.

The essential quality of mind necessary for making a will is the ability to comprehend the nature, amount, and value of one's property in a general way, the number and the claims of one's relatives, and the effect of the will. Any form of mental weakness or delusion which affects this ability or affects a person's relations with his family at the time of making his will will render him incapable of making a valid will. No other form of mental weakness and no other delusion will affect a person's ability to dispose of his property, and a will made during a lucid interval in insanity will be valid.

In some states a woman after her marriage can make a will only with the consent of her husband.

In order to determine whether a person is old enough to make a will of personal property, or whether a married woman must have her husband's consent in order to make a will, it is necessary to consult the statutes of the state where the person lives, if the will concerns personal property; of the state where the property is located if it concerns real estate.

§ 371. Restrictions on the Power of Making a Will

The power to leave property by will is derived from the law and depends solely on the law for its extent and enforcement. This power is not a natural right, as is the right of

[1] For form of will, see Chapter XCI, Form 66.

living men to own and control property created by their labor. When brain and hand no longer act, the natural right ceases and the right to control property is only that given by the law.

Before property can be distributed among those to whom the deceased wished it to go, his debts must first be paid. Debts are always paid, if possible, out of the personal property, so that if there is no provision in the will to prevent this, the result may be that those to whom personal property has been left may get nothing, while the gifts of real estate may be carried out in full.

In most states there is some restriction on the right to leave property to charity when one dies leaving a husband, wife, or children surviving. In New York if the deceased person left husband, wife or child, not more than one-half the property can be left to charitable organizations.

As a general rule, where a woman marries after making a will, or where a man marries and has children, any will previously made is revoked and a new one must be made. This is to protect the claims of the husband, wife, or children, as the case may be. A man may cut off children from sharing in his estate, but his intention to do so must be made evident. In some states it is not possible for a woman to cut off her husband from some share in her property, even by a will expressly stating such an intention.

As a usual rule where some of the children are born after the making of the will, the whole will does not fail, but the share which the children would have had had there been no will (see §§ 367 and 368) is taken out of the property first and given to them, and then the rest of the property is divided in accordance with the terms of the will.

Notes:

1. If you wish to cut off any of your children from a share of your property, it should be stated in plain terms and the reason should be given.

2. A woman must make a new will in case of subsequent marriage, or a man in case of subsequent marriage and the birth of children.
3. By setting aside a certain amount of property for division among any children that may be born after the making of the will, or expressly providing that they are not to share in the property, the upsetting of the will by their birth may be avoided.
4. A provision may be inserted in a will that in case debts to a large extent have been paid out of the personal property, those to whom the real estate was left shall contribute pro rata, so that each person shall get a proportionate amount of the property left him whether realty or personalty.

§ 372. General Form for Wills

There are certain formalities which must be complied with in all wills. The easiest way is to remember *how* they are to be complied with. The first paragraph of a will should contain the statement that it is the "*Last* Will and Testament" of the person making it, giving his name and address in full (including county and state) and the date on which it is made. It should also state that the testator (the person making a will, revokes all previous wills. The word *last* is of the utmost importance.

The following is a brief form of the correct commencement of a will.

> I, John Smith, of 206 Lexington Avenue in the Borough of Manhattan, City, County, and State of New York, revoking all wills by me heretofore made, do hereby publish and declare this my Last Will and Testament on this 1st day of December, nineteen hundred and seventeen, in manner and form following: . . . .

The will must be signed and sealed at the end by the testator. He must sign it in the presence of witnesses—it is wisest

to have at least four, unless you know how many are required in the particular state, as the laws of the various states differ as to how many there must be—and must declare to them that it is his last will and testament and ask them to sign it as witnesses. The witnesses must sign the will in his presence, and must also give their addresses. The law provides for a heavy fine if they omit the latter.

The best way is to end the will with what is known as an attestation clause, stating all of these things. This will remind the maker of the will of what is required and when the will comes to be probated will be regarded as showing that it was properly executed unless testimony is introduced to show that the statements were not actually complied with.

The following is a correct attestation clause. It must follow immediately after the testator's signature.

> Signed, sealed, published, and declared by the above-named testator, John Smith, on the 1st day of December, nineteen hundred and seventeen as and for his Last Will and Testament in the presence of us who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses the same day and date.

The words "published and declared" refer only to the statement made to the witnesses before asking them to sign.

In New York the letters L. S. are sufficient for a seal. In other states a little red wafer, carried by any legal stationer, is sufficient.

The will of the late Edward H. Harriman which follows is brief and yet contains everything the law requires:

> I, Edward H. Harriman, of Arden, in the State of New York, do make, publish, and declare this as and for my last will and testament, that is to say:
>
> I give, devise, and bequeath all my property, real and personal, of every kind and nature, to my wife, Mary W. Harriman, to be hers, absolutely and forever, and I do

hereby nominate and appoint the said Mary W. Harriman to be executrix of this will.

In witness whereof I have hereunto set my hand and seal this eighth day of June, in the year nineteen hundred and three.

EDWARD H. HARRIMAN. (L. S.)

Signed, sealed, published, and declared by the testator as and for his last will and testament, in our presence, who, at his request, and in his presence, and in the presence of each other, have each of us hereunto subscribed our names as witnesses,

CHARLES A. PEABODY,
13 Park Avenue, New York.
C. C. TEGETHOFF,
291 East Seventeenth Street,
Flatbush, L. I.

In arranging your will, always put the large gifts first and the small bequests at the end.

Nuncupative Wills. Soldiers and sailors when about to die in battle may make their wills by word of mouth in the presence of witnesses. This is known as a nuncupative will. It is not a safe method to employ.

Holographic Wills. In some states, a will entirely in the testator's own handwriting does not need witnesses. The handwriting is sufficient to prove it. This is called a holographic will. It is very much safer to have witnesses. The will is good only in the state and not if it affects real property outside the state.

What Powers to Give Executors. The executor or executors named in a will may be dead or mentally incapacitated at the time of the person's death, or they may refuse to serve. It is wise to provide an alternative or several alternatives, or to make a trust company executor.

In case some of the executors refuse to serve, the will should provide that the others may act without them. To

avoid future difficulty, the will might also state that in case of a dispute a majority may decide any matter.

Executors should be given in the will the power to sell real estate if it is necessary in order to pay debts or to carry out the provisions of the will. Otherwise, where personal property is insufficient to satisfy the gifts which were made by the will, real property may be disposed of by the law as though there were no will.

In order to induce an executor to serve, the will should relieve him from liability for anything except dishonesty.

Trustees. If it is necessary to hold property for any length of time before final disposition, trustees must be appointed.

In naming trustees, it is also wise to make provisions for an alternative in case the trustee named cannot serve. If there is an enforceable trust the court will appoint a trustee to take charge of it, but if the maker of the will wished to exercise his own judgment this provision should be made.

Unless the united judgment of all the trustees is desired on matters connected with their trust, if there are several trustees the will should provide that a majority may act in any matter. Trustees should always be given powers to sell any of the property from time to time when it becomes necessary to protect the estate, and to reinvest the proceeds.

As the range of investment which the law allows a trustee is very limited, it is a good idea to provide in the will in what kinds of property, stocks, bonds, etc., he is to be allowed to invest. Trustees may be given the power to appoint their own successors in any way that the person making the will thinks fit.

At the present time it is the better practice to name a trust company as trustee instead of private persons. For many reasons this is *safest* and most satisfactory.

Statutes. The form in which a will of real property must be drawn, as well as the disposition of the property by its

means, is governed by the law of the state where the property is located.

A will of personal property must be drawn up in accordance with the law of the state of which the testator is a resident at the time of his death.

Any will must therefore comply with the laws of the state (of which the testator is a resident) and with the laws of any other states in which real property devised by the will is situated. If the precaution is taken to have at least four witnesses, it will satisfy the law of most of the states of the Union.

But in order to find out the regulations governing the manner in which property may be left, the real property law of the state in which the property is located and the personal property law of the state in which the testator resides must be consulted.

Death of Beneficiary. In most cases a general clause is added providing that all the residue of the property goes to some particular legatee. This portion so left is called the "residuary estate."

A will may always provide that if the person to whom the property is given is dead at the time the will takes effect, the property shall go to another person or to the residuary estate. As many others may be named as the testator desires. In case the property is to be given outright it is necessary to provide first, before using the words of gift, that the person is to take the property only if he is living at the time, and if not that it is to go to someone else. Otherwise, in case of death of beneficiary, legacies lapse, except to children or to son-in-law, or to daughter-in-law, whose children would inherit after them.

The following is the proper way to make such a provision:

> If Henry Adams shall be living at my death, then I give and devise to him and his heirs forever such-and-such property (describing and locating it), but if the said Henry

Adams shall die before me, then I give and devise the said property to James Green and his heirs forever.

Or,

then the said property shall be added to and form a part of my residuary estate.

In case of a trust the same trustee may be named, and simply directed to pay the income over to the second legatee in case the first beneficiary is dead at the time the will takes effect.

A simple will leaving property outright to members of your own family might safely be drawn in accordance with the rules laid down here, but, unless the disposition of the property is very simple as in the case of the Harriman will, the best thing to do is to consult a reliable lawyer. It is impossible to give all the details of the local laws in a work of this scope.

It is said to be the custom at lawyers' dinners to toast the man who makes his own will, as such a course usually results in much profitable litigation.

Notes:

1. If possible, avoid complex and long-term dispositions of property.
2. Employ a competent lawyer and make sure that he knows what property you have and what you wish done with it.
3. If you change your residence after making a will, be sure to see that it complies with the law of the new state of residence or else make a new will.

§ 373. How to Dispose of Real Property

There are various ways in which a person may dispose of his real property by will after his death. He may give it to someone outright; or to one person for life, and absolutely to another at the first person's death; or to several people in succession for life, and to another absolutely on the death of the last person.

The proper form of words for giving property outright is:

> I give and devise (description and location of property) to my nephew, John Smith, of Arlington, New Jersey, and his heirs forever.

The proper form of words to give property for life is:

> I, Mary Green, give and devise (describe property fully) to my brother, Henry Adams of Syracuse, New York, for his life, and upon his death I give and devise (naming the property) to my son James Green and his heirs forever.

It would be perfectly proper upon Henry Adams' death to leave the property to someone else (or in some states to several other persons) for life before giving it finally to James Green. In New York there could be only two persons to have it for life altogether, and if more were named, James Green would get it on the death of the second. The persons named must, however, be living at the death of the person making the will. One could not leave property for life to a child unborn at the time of one's death. If no one is mentioned to whom the property is to go at the conclusion of the last life estate, it will then be distributed according to law. (See § 367.)

The property may be given to one person for the life of another. In that case the will would read thus:

> I give and devise (description and location of property) to my brother Henry Adams, during the life of my son James Green, and upon James Green's death I do give and devise said property to my grandson Samuel Brown, to him and his heirs forever.

If Henry Adams should die before James Green, the right to make use of the property during the rest of James Green's life would be regarded as personal property, and Henry Adams could leave it by will or the law would dispose of it as explained in § 368. Upon James Green's death the property would go to Samuel Brown outright.

Property as a usual rule could be left in this way only during the life of one person.

But the proceeds of property may be accumulated for a child and not paid over until he becomes of age. A good direction for an accumulation would be as follows:

> I hereby give and devise (description and location of property) to my grandson Samuel Brown, to him and his heirs forever, and I direct my executors to hold the said property and to accumulate the rents, issues, and profits thereof until my said grandson shall come of age, and at that time to pay the same over to him.

It is also possible to leave property to one person in trust for another. The trustee in whose care it is left manages it and pays over the proceeds to the person to whom they were given, and accounts to the court for his dealings with the trust property.

The proper form of words to create a trust is:

> I hereby give and devise to Henry Adams (name and description of property), to him and his heirs and successors in trust to collect the rents, issues, and profits and to pay them over to James Green.

James Green cannot dispose of the property itself but only of the proceeds. Henry Adams cannot make use of the proceeds, but may do all necessary things with reference to the property, such as leasing it. He may be held accountable, however, by James Green for any breach of trust or negligence in his management.

In order to be sure as to just what can be done with property, it is necessary to consult the real property law of the state where the property is located, as the above provisions vary slightly in the different states.

The creation of trusts is highly technical and should not be attempted save under advice of a competent lawyer.

If you desire to leave real property to charitable organiza-

tions, including schools and colleges, it is necessary to consult the law of the state where the property is located to find out whether you can so leave it, and, if so, with what formalities you must comply; and the law of the state where the organization is located to see whether it can take the property.

Notes:

1. In devising real property it should be described so completely that it will be certain as to what is included, and to avoid mistake its location should be given definitely.

§ 374. How to Dispose of Personal Property

In disposing of personal property, one may either leave a certain amount of money to a person, or may provide that some specific piece of personal property, such as a piece of jewelry or an article of furniture, or some special stock or bonds, shall be given him.

Where a specific piece of property is given to anyone, any debts will have to be paid out of the other personal property first. If there is not enough of this other personal property to pay the debts, the specific property will be sold.

On the other hand, where amounts of money are left to particular persons, any personal property not specifically given to anyone will be sold in order to get funds to pay the legacy. The debts will be paid out of this property first, and if there is not enough of it to pay both the debts and the legacies, those to whom money has been left may get nothing.

The proper form of words to use in making a gift of personal property by will is:

> I give and bequeath—the personal property (describing it) to so-and-so.

The will may provide that in case the person to whom the gift is made is dead at the time the legacy takes effect, another

person is to have the property, or that the gift shall be added to and form a part of the residuary estate. Or the will may provide that the person named is to have the property only under certain conditions, and in case these are not fulfilled it is to go to someone else.

Personal property may be left in trust; then the trustee has control of the property and pays over the income as described in § 373.

Before making a will of personal property, the testator should consult the personal property law of the state where he resides, and if he moves to another state at any time his will must be changed to conform to its laws.

Notes:

1. Generally people err who tie up property for long periods after they have gone. It is a form of egotism that leads a man to try to impose his control on those he leaves behind.

§ 375. The Residuary Clause and Its Uses

It frequently happens that a person has more property when he dies than he had at the time he made his will. Or it may happen that the person to whom personal property has been left dies before the will takes effect, thus leaving that property undisposed of. A convenient way of providing for either of these contingencies is to make a general clause at the end of the will covering all such property and providing to whom it shall be left.

This is called the "residuary clause" and the person to receive it is called "the residuary legatee." It is usually expressed in this way:

> All the rest, residue, and remainder of my estate I give, devise, and bequeath to so-and-so.

This covers both real and personal property that may have been left undisposed of when the time comes to put the will

into operation. It is usual to leave the residue to a near relative or relatives or to the principal beneficiary of a will.

Notes:

1. The "residue" of an estate may amount to a considerable sum, and it is important to make careful disposition of it in the residuary clause.

CHAPTER LXII

HOW TO CHANGE OR TO REVOKE A WILL

§ 376. How to Change a Will

If you desire to change your will, do not make changes in the instrument itself. Any erasures or interlineations are likely to make the will invalid. No changes or alterations will take effect unless it can be proved that they were there when the will was originally signed. If there are any erasures or interlineations in a will, the attestation clause should state that they were made before the will was signed.

The proper way to change a will is by drawing up another paper called a codicil in the same form as the will itself except that it states that:

> I, John Smith, of 206 Lexington Avenue in the Borough of Manhattan, City, County, and State of New York, on the 3rd day of January, nineteen hundred and eighteen, do hereby publish and declare this codicil to be my Last Will and Testament in manner and form following: . . . .

The codicil must be signed, sealed, and declared to be such in the presence of witnesses, in the same way as the original will, and these witnesses must be asked to sign and must state their addresses.

If it is desired simply to add something, the codicil proceeds in the same way as the original will. If it is desired to make a change in any provision of the original will, the paragraph in which the provision occurs should be referred to. For instance:

> Whereas in paragraph two of my said Last Will and Testament, I did give and devise certain real property to

my son, Peter Lane, I do now revoke said gift and do hereby give and devise the said real property to my nephew, Richard Lee, to him and to his heirs forever, . . .

§ 377. How to Revoke a Will

A will may be revoked only by the action of the testator himself. He may direct someone else to perform the actual operations for him. No destruction or other interference by any other person will prevent the will from taking effect. If the will is partly or entirely destroyed, it may be proved by the testimony of witnesses, or of the lawyer who drew the will.

If the testator attempts to alter a will by making erasures or interlineations, he may revoke it without intending to.

The proper way to revoke a will is for the testator either to destroy or to cancel it by making some mark or tear in it, or by making a new will stating that the former one is revoked.

A codicil may be revoked in the same way. If a codicil is to be revoked, the whole will had better be executed again since by revoking a codicil the clause affected in the original will may not be revived.

A radical change in circumstances, such as the birth of issue after testator's death, may have the effect of revoking his will unless the will states that it should not be revoked by such changed conditions.

The safest way to revoke a will is to destroy it entirely. If it remains in your possession until after your death and a later will is lost, it may take effect. Provision should always be made in the first clause of a will that all former wills are revoked.

CHAPTER LXIII

OTHER WAYS OF DISPOSING OF PROPERTY AFTER DEATH

§ 378. Deeds of Trust

By making a deed of trust it is possible to avoid the necessity of drawing a will and incidentally, the necessity of settling up the estate. Such an instrument which conveys the property to a trust company or other trustee, in trust, provides that the person deeding the property is to have the use or the profits of his own property during his lifetime, and then disposes of it after his death to the various persons whom he selects as beneficiaries.

By such a deed of trust the person may make himself trustee for his life and thus leave the management of the property in his own hands. The objection to such a disposition is that it makes it difficult to sell any of the property, since purchasers will usually want a release from the persons who are to take the property after the trustee's death.

This may be avoided by providing in the deed of trust that the person making it reserves the right to revoke or to change the whole or any part of it at any time. He may then revoke and change part of it whenever he wishes to dispose of any property during his lifetime. Of course, there is the trouble and the expense of drawing a new deed or making amended deeds whenever this is done. If the person owed money or afterward got into debt, such a deed of trust would be of no effect. Any arrangement of the kind would have to be worked out under competent legal supervision.

§ 379. Gifts in View of Death

A person who believes himself incurably ill and at the point of death, may make gifts to take effect upon his death. If the testator should recover, the gifts would not take effect.

In order to make gifts effective, the property itself should be handed to the person to whom it is to be given either by the testator himself or by someone else at his direction, if possible. If the gift consists of a bulky article, something to represent it may be given. For instance, the key of a trunk or of a chest might be handed over. The gift of a savings bank-book amounts to a gift of the bank account.

Notes:

1. Property given in view of death must be actually handed over. A promise to make a gift is not a gift *causa mortis* and cannot be enforced.

CHAPTER LXIV

HOW TO TAKE CARE OF THE PROPERTY OF A DECEASED PERSON

§ 380. If the Deceased Person Left a Will

If the deceased person left a will, the first thing to do would be to probate the will. If the deceased left any personal property, the will must be probated in the state of which he was a resident when he died. Probating a will means that it must be presented and proved in a special court called a probate, surrogate's, or orphans' court.

The witnesses to the will itself, or at least some of them, are always examined as a matter of formal proof before admitting the will to probate. If there is a contest, the testimony of the lawyer who drew the will and of anyone familiar with the circumstances may be given to prove it, or to prove the testator's mental capacity at the time it was drawn. It is the duty of the person offering the will for probate to obtain the necessary testimony.

Notice must be given of the probate to everyone who receives anything under the will, to everyone to whom the law would have given the property had there been no will (see §§ 367 and 368), and to any creditors. Usually the procedure incident to probate requires the aid of a lawyer.

If personal property of the deceased is situated in other states, it may become necessary to take out letters of administration in those states also. These are called ancillary letters.

If the will does not provide that the executor is to serve without giving bond, he will in many cases be required to give a bond in double the amount of the property belonging to the

estate and with a certain number of sureties, before letters will be issued to him. In New York this is a matter of discretion with the surrogate.

One of the first claims to be paid will be the inheritance tax if there is one. Each state allows a certain amount of exemption on property left to near relatives. The statutes should be consulted to find out what their rights are.

It will usually be necessary to have the property appraised by one or more disinterested appraisers to ascertain the amount of the inheritance tax. Unless the will provides that the inheritance tax is to be paid out of the estate, it must be paid out of the property going to each individual beneficiary. If the beneficiary does not want property sold to pay the tax, he may pay the tax out of his own pocket and take the article left him as it was.

If the estate is small and there are no debts and no disputes as to the distribution of the property, it is not always necessary to go to the expense of probating the will and the appointment of an executor, unless there are stocks or bonds which have to be transferred on the books of the company that issued them. If there are any such, it will be necessary to have an executor appointed to transfer them. A careful lawyer can tell when it is safe to settle an estate out of court.

Where the executor named in the will fails to qualify, the law appoints the person most interested in the estate, usually a relative, as an administrator *cum testamento annexo* (with the will annexed). After his appointment his duties are precisely those of an executor. He sees that the provisions of the will are carried out. Commissions based on the amount of estate actually received and paid over are allowed by law.

§ 381. If the Deceased Person Did Not Leave a Will

If there was no will the nearest relative entitled to a share in the estate (see §§ 367 and 368) may be appointed adminis-

trator. Where several persons are thus entitled, such as children, brothers and sisters, nephews and nieces, etc., men will be preferred to women, and unmarried women to married women. All of the persons so entitled may be appointed administrators together, or, by the consent of all who are in any way interested, an outside person may be appointed.

If no one else takes out letters of administration and there are any debts or claims against the estate, a creditor or a claimant is entitled to letters of administration.

An administrator will always be required to give bond with sureties in double the amount of the property belonging to the estate, to guarantee that he will faithfully perform his duties. His commission is the same as that of an executor.

The duties of an administrator are to advertise for claims against the estate, to pay those which seem proper and to reject the others, leaving them to be settled by suit; and finally to distribute the property to those persons who are entitled to it according to law.

The administrator should at once ascertain and settle all the inheritance taxes and make claims for exemptions due anyone interested in the estate.

As a usual rule, the estate must be appraised by one or more disinterested appraisers for the purpose of ascertaining the inheritance tax.

The executor or the administrator is bound, if assets will permit, to perform the contracts of the deceased in so far as they do not call for the personal qualities of the deceased. If he continues a business in which the deceased was engaged, he must account for the profits, if any, but must himself assume the losses of a continuance in business, unless the will provides that such possible losses may be paid out of the estate.

If the property is located in several states, it may become necessary to take out letters of administration in each one. Generally the courts prefer to give such letters to a resident of

the jurisdiction where they are granted, but a relative would have a right to them even in a foreign state if he were entitled to the property by the law of that state.

In the case of a small estate with no creditors and where the relatives are all of age, they may simply divide up the property among themselves by agreement and save the expense of administration. Each one who would be entitled to a share under the laws of the state should give a release of his share somewhat as follows:

> The undersigned, being entitled to a certain share in the estate of my father, James Smith, late of Ithaca, New York, do hereby in consideration of (here specify money or property received from the estate) release and relinquish all my right and interest in and to the said share.
>
> Witness my hand and seal this 1st day of November, 1917.
>
> (Signed) JOHN SMITH (L. S.)

If there are stocks and bonds which must be transferred on the books of the respective companies, it will be necessary, as a rule, to take out letters and to furnish the companies with certificates of their having been issued. If money belonging to the deceased was on deposit in a bank, it could not be withdrawn except by a duly appointed executor or administrator.

Notes:

1. An administrator should be careful to get vouchers or releases from those to whom he distributes the property under the law.

CHAPTER LXV

RIGHTS IN PROPERTY LEFT BY WILL

§ 382. If Real Property Has Been Devised by Will

If real property has been left by a will which did not provide that the inheritance tax was to be paid out of the funds of the estate, the party to whom the realty was left will be obliged to pay the inheritance tax, if there is one, before he is entitled to receive the property. A near relative, a husband, wife, father, mother, child, brother, or sister, would probably be entitled to some exemption. That is, a near relative is entitled to receive property worth a certain amount without paying any tax. After the specified amount has been reached, the tax is levied at a certain percentage, which is generally less than it would be for persons not related at all or for charitable institutions.

In order to determine what, if any, rights to an exemption exist and whether there is a tax due at all, it is necessary to examine the inheritance laws of the state where the real property is located.

Action to Contest a Will. If any contest is made about the will, all the evidence to prove the validity of the will must be brought in. Everyone interested must have notice of the commencement of any action to contest the will, and all such persons are entitled to be present at the trial and to be represented by counsel.

If property is left to a person by one will, and another of later date is offered for probate by which the bequest is either diminished or left out altogether, it is not wise to contest the last will unless there is clear evidence to prove that the testator

was so mentally weak as to be unable to realize the nature of his acts and the value of his property at the time he made the will, or that he had an insane and unfounded prejudice against some member of his family.

If a will is contested, the person who would inherit the real property if no will existed is entitled to notice of the action to contest it and is entitled to be present in court and to be represented by a lawyer. He may bring in witnesses to disprove the will or the testator's mental capacity.

Undue Influence. Undue influence, on which ground so many contests are made, must have been an influence so great over a person mentally weak that he was entirely incapable of exercising his own judgment. Contesting a will is an expensive process and a person should have very clear grounds before attempting it.

A man's will, as expressed by the name, is his will as to the disposition of his property, and rarely pleases anyone except those who are immediately benefited. Owing to the publicity given to famous cases where wills are contested, there is an erroneous popular impression that any clever lawyer can break a will. It is very difficult to break a will; of all the wills probated each year but a small percentage are contested and few are ever set aside.

§ 383. If Personal Property Has Been Left by Will

The statement made in the last section may also apply to personal property. To find out whether there is an inheritance tax, and if so what exemptions may be claimed, one must consult the law of the place where the maker of the will had his residence at the time of his death. There may, however, be further taxes on the transfer of stocks and bonds under the laws of the states where the companies are located. In the case of these latter taxes no exemption is allowed.

A person who would have a right to a share in the personal

property if there were no will is entitled to be present at, and to be notified of, any contest of the will. He may be represented by his lawyer or he may contest the will himself if he thinks there is good cause.

A person is entitled to a transfer from the executor or the administrator of any stock certificates or bonds left him by the will, and may then have new certificates issued to him on the books of the respective corporations.

Notes:

1. To contest a will is rarely wise. (See § 28 on litigation.)

CHAPTER LXVI

RIGHTS IN PROPERTY WHEN THERE IS NO WILL

§ 384. In the Case of Real Property

If a person dies without disposing of his real property by will, those persons mentioned in § 367 become entitled to it. Real property, unlike personal property, becomes the property of the heirs on the owner's death without any further action. Realty is liable for debts only in case there is not enough personal property to pay them. As a rule some action must be brought by the creditor against the heir before real property may be sold.

One obligation that must be met before the heir can take possession is the payment of any transfer or inheritance taxes on the property. This tax must be paid or the property will be sold and the tax collected out of the proceeds. If not sold, the title is not marketable until all transfer taxes are paid, or a record made that it is exempt.

§ 385. In the Case of Personal Property

If a person dies intestate leaving personal property, an administrator must be appointed. Those persons named in § 368 as being entitled to the personal property are respectively entitled to the administration of the estate. If no one else who has a better right makes a move to take out letters of administration, one of the relatives who has a right to a share in the personal property may notify the others and apply for letters himself. Then if none of those who have better rights qualify as administrator, the letters will be granted to the applicant.

The administrator must give a bond to perform his duties faithfully. The bond must be in double the amount of the personal property left.

Any inheritance taxes are deducted from the share of each person. Near relatives are entitled to a certain amount which is exempt from tax. The state and the federal law must be consulted to ascertain the amount of the inheritance taxes and exemptions.

§ 386. Rights of a Husband or a Wife

After her husband's death a wife is entitled for the remainder of her life to the use of one-third of all the real property which her husband owned during their marriage. This is her right of dower, which cannot be taken from her by any means except by her own signature to a deed or a release or an agreement made at or before marriage. If the property has been left to someone else by will, it is subject to this right, and the person receiving it must either give the widow the use of one-third of the property or settle with her in money for it. The same is true where there is no will. The heirs must settle with the widow for her dower right.

The widow may appear in court at the time of the settlement of the estate and claim her dower right. Or, if it is denied her, she may bring an action to enforce the right. Where the property is distributed by law, the law usually provides a certain length of time within which those who take the real property must settle with the widow for her dower rights.

If there are living children, a husband has a right to a life estate in all of his wife's real property. In many states today, however, she can cut off this right of courtesy by selling the property during her lifetime, or by leaving it to someone by will.

Where a husband has the right of courtesy, another person

entitled to the wife's property gets it only after the husband's death. The husband has the same right to enforce his right of courtesy that a woman would have in case of dower.

Where a person dies without leaving a will, the husband or the wife has those rights in personal property mentioned in § 368, and may enforce them in the same way as has been described in § 385.

Either husband or wife may lose all rights in the estate by delaying to enforce them. Claim should be made promptly of the executor or the administrator with the will annexed, or of the heirs, if the person died without leaving a will.

CHAPTER LXVII

RIGHTS OF CREDITORS

§ 387. What Creditors Must Do

All creditors should present their claims against an estate promptly. If there is no move to administer the estate, any creditor has a right to serve notice on the relatives and the other persons interested and to apply for letters of administration. If no one else appears and qualifies, the administration of the estate is granted to him. He is obliged to give the usual bond with the number of sureties required by law, and in double the amount of the property belonging to the estate, to administer it faithfully.

If a creditor failed to read the notice and to present his claim within the time limited by law, he may lose the claim altogether. If the debtor has died without the creditor's knowledge, the latter's failure to present his claim on time will not be excused.

Notes:

1. When a customer dies in debt to a business house, the collection department must inform itself and act promptly.

Part XIII—Personal Relations

CHAPTER LXVIII

HUSBAND AND WIFE

§ 388. Persons Who May Marry

Before marrying, one should always consult the law of the state where the ceremony is to be performed. Almost all states require a marriage license.

Age Requirements. All states require the consent of parents or guardians if the parties are under a certain age. This age varies in different states; the average age ranging from fourteen to eighteen years for a woman, and from sixteen to twenty-one years for a man.

Forbidden Marriages. Some states forbid the marriage of first cousins. Many states forbid intermarriage between races, and in some of the southern states marriage between a white person and a negro is a crime. Persons married to those of other races or to very near relatives should consult the laws of a state before taking up residence in it, as, even if such marriages are valid in the states where they were performed, in other states which forbid such marriages it might be a crime for the parties to live together.

Annulment of Marriage. If a person who is under the age of consent, as fixed by the law of the state where the marriage takes place, marries without his or her parents' or guardians' consent, the parents or the guardians can usually have the marriage annulled; but not if, after coming of age,

the person has of his or her own free will lived with the other party to the marriage.

Invalid Marriages. Anyone who has a husband or a wife living and is not divorced cannot, of course, marry again. If he or she attempts to do so, the marriage is of no effect; but as a rule the other party to the first marriage may apply to the court to have the second marriage declared of no effect and to establish the fact that the children of the first marriage are the legitimate children of the innocent party. This is a wise course, as it insures the property rights of the children.

The injured person may also cause the other party to be prosecuted criminally and sent to prison for bigamy. In this case the prosecution must be brought in the state where the bigamous marriage took place.

If a person marries again with the honest belief that a long missing husband or wife is dead, there would be no grounds for prosecution, but the other party to the second marriage may apply to have the marriage set aside and any children declared to be his or her's only. The person who marries believing in the death of a husband or wife may apply to have the second marriage set aside; also the missing husband or wife may, unlike Enoch Arden, apply for annulment. In such a case the children would go to the other party, the one who had no previous marital entanglement. If no action is brought, such a marriage remains valid and binding, but the supposedly dead husband or wife would probably have to apply to the court in order to obtain the right to marry again.

The length of time for which the absent person must have been missing in order to permit the husband or the wife to marry again without committing bigamy differs in the various states. In such a case the statute law of the state where the new marriage is to be performed should always be consulted. The length of time prescribed by law varies from five to seven years.

Marriage Against One's Will. A person cannot be married against his will; if forced into a marriage, or induced to marry through fraud, or if he marries while too drunk to understand the nature of his act, he may apply to the court to have the marriage declared void. The relatives or friends of an idiot or an insane person who attempts to contract marriage may have the attempted marriage declared of no effect. If a person marries while sane and afterwards becomes insane, that is a different matter; the marriage holds good.

If a person discovers after marriage that the other party is physically incompetent to enter into the marriage relation and that this physical condition is incurable, he or she is entitled to have the marriage set aside. Except where there has been specific legislation on the subject, contagious diseases, such as tuberculosis, venereal diseases, etc., do not prevent a person from entering into a binding marriage.

In any case a party who is entitled to have the marriage annulled must act promptly. If there is any unnecessary delay, or if the party willingly lives with the other party after discovering the circumstances which would entitle him or her to be released from the relation, the courts will refuse to interfere. Even when persons are entitled to be freed, it is against public policy to break up marriage where there is any disposition of the parties to continue living together.

Notes:

1. Wherever there is a marriage license bureau, all the information necessary as to the law may be obtained at that bureau. If there is none, one should consult the domestic or personal relations law of the state or a reputable lawyer.

§ 389. What Constitutes a Marriage

The usual marriage ceremony in this country is a religious one, and inasmuch as clergymen can lawfully perform mar-

riages, this is all that is necessary. A clergyman is not authorized to perform marriages until he has been duly licensed to preach. There must be some witnesses present, usually two. But in other countries a civil as well as a religious ceremony is necessary since only the civil ceremony is binding. Certain officers in this country, such as mayors, city clerks, and justices of the peace are authorized by law to perform marriages.

Persons may also marry in some states by simply signing a written contract in the presence of other persons who sign with them as witnesses. All who sign must acknowledge their signatures before a judge or some other authorized person and the contract must be recorded in the office of public registry.

Formerly it constituted a valid marriage in most parts of this country if two people who were living together simply introduced or spoke of each other to third parties as husband or wife. But this so-called "common law marriage" has been abolished by law in many states, and it is never a safe form of marriage. Some ceremony or formal solemnization is necessary. Marriages according to the customs of the Society of Friends and the Ethical Culture Society are recognized as valid in most states.

Notes:

1. In most states a marriage license is necessary and no clergyman or official will marry a couple until they produce the formal license.
2. A marriage certificate signed by the clergyman and by the witnesses should be given the bride to keep as proof of the marriage.
3. Any person intending to marry should make sure that the party performing the ceremony is duly authorized. "Fake" and unlicensed clergymen frequently form the basis of the plots of dime thrillers and movie shows.

§ 390. Personal Rights of Husband and Wife

A wife has a right to claim support from her husband. She may compel him to support her by bringing an action in the proper court, or she may order such things as she needs and have them charged to him. The things so ordered must, however, be articles of food, clothing, medicine, or other things necessary to health, life, or comfort. It has been decided that theater tickets and bonbons are not necessaries of life. A wife has a right to order things of a quality suited to her husband's income. If he is wealthy or in comfortable circumstances, servants' wages and taxi hire may be considered necessary for her proper support.

A husband has a right to require his wife to perform such services as are necessary to conduct his household in accordance with the style of living to which his income entitles him. A wealthy man has a right to ask his wife to supervise and oversee his servants, to manage his household accounts, etc., and a poor man may rightfully ask his wife to perform necessary domestic work such as cooking, cleaning, etc. This is in return for the duty of support which he owes her.

Ground for Divorce. Both husband and wife have a right to each other's society. If either one leaves the other it is good grounds for the deserted party to obtain a legal separation, or in some states a divorce, unless it was because the husband's or the wife's cruelty, habitual drunkenness, or moral turpitude had made it unsafe to live with him or her. (See § 393.

Neither husband nor wife can sue the other for damages for injuries, but either may be bound to keep the peace if he or she abuses the other, or the injured party can secure a legal separation.

Notes:

1. The right to buy necessaries on the husband's account is restricted by his credit and the mer-

chant's willingness to take chances on collecting the amount.

2. A merchant charging a wife's necessaries to a husband's account should make sure she is not obtaining enough elsewhere. If so, he cannot collect.

§ 391. Rights of Husband and Wife in Each Other's Property

The question of dower and courtesy has been taken up more fully in the chapter on wills (§ 386) and real property (§ 351). Where dower exists it cannot be taken from the wife unless she signs a deed of the property or a written release of her right of dower.

In New York the wife can cut off the right of courtesy of her husband by making a will which leaves the property to other persons.

Formerly, a husband had a right to the use of his wife's real property during her life. This was called an estate by marital right. Probably in none of the states of the Union does this right exist today. In former times all a wife's personal property at once became her husband's when they married, and all he had to do in order to claim the personal property was to take possession. This right, too, has been greatly modified and in most states entirely abolished.

The law gives husband and wife certain rights in each other's personal property after his or her death. These rights vary, and it will be necessary to consult the Decedent's Estate Law in each state to find the exact terms of the statutes. In New York one-third legally belongs to the surviving person if there are any children; one-half if there are no children but other near relatives; and the whole if there are no surviving relatives.

In California, Louisiana, and Texas, the French system of community property prevails to a certain extent. The marriage relationship is regarded as a partnership. Any property

which either husband or wife acquires after marriage becomes the common property of this partnership, and either husband or wife has a right to it.

Notes:

1. A married woman may, as a rule, prevent her husband from getting control of any of her property either before or after her death. In some states she still must obtain his consent in order to sell her property. In most states today a husband cannot cut off his wife's right to dower without her consent.

§ 392. Rights of Husband or Wife in Case the Other Is Injured

A husband has a right to recover damages for his wife's injuries because of his legal right to her services. The injury deprives him of these services and he is awarded damages as a compensation for his loss. He may recover, in addition, for the expense of medical attendance.

A wife has a right to recover damages only in case of her husband's death, and then only if the statute law of the state gives her a right of action. The Employers' Liability and Workmen's Compensation Acts usually give this right of action. (See Chapter XL.)

In some states either husband or wife has a right to recover for the death of the other under the acts giving the right; in others, only the wife has a right to such compensation. The wife has in no case a right to recover for her husband's injuries. That right is his. A wife has a right to recover for her own injuries in addition to her husband's right to damages for loss of her services. In all cases the law of the state must be consulted in order to know exactly what those rights are.

§ 393. Divorce

There are two forms of divorce: one is the limited divorce which most people, when they distinguish between the two forms, call a separation; the other is absolute divorce.

A legal separation merely gives to the parties the right to live apart and to a wife a right to claim a definite sum as support from her husband while living apart. The limited divorce does not give any right to marry again.

An absolute divorce completely separates the husband and the wife as though they had never been married. If parties become reconciled after a divorce and wish to be married again, it is necessary for them to solemnize a new marriage. After a legal separation they may simply resume living together. After an absolute divorce either party is entirely free to marry.

The difficulty about divorce lies in the fact that there is no uniform law on the subject. Circumstances which one state considers ground for absolute divorce are in another merely ground for a legal separation. In New York the only ground for absolute divorce is unfaithfulness to the marriage tie. In some of the western states what is known as incompatibility of temperament, or inability to get along happily together, is considered ground for an absolute divorce. Between these two extremes, there are states which recognize cruelty, habitual drunkenness, or abandonment as a ground for such a divorce. In almost all the states, including New York, a sentence to state's prison for life is ground for absolute divorce and even gives the other party a right to marry again without a formal divorce. All of these things, except incompatibility of temperament, are grounds for a legal separation in states where they are not recognized as grounds for absolute divorce.

The popularly condemned method of taking up a temporary residence in a state which grants a divorce on easy grounds and obtaining a divorce without the defendant's appearing in

the case at all, either in person or by lawyer, is, besides being revolting to the moral sense of the community, an extremely unsafe method. Unless the summons is personally served on the defendant within the state where the action takes place, or the defendant voluntarily appears in court or is represented by a lawyer, the decree is not good outside the state where it is granted. Many states also do not recognize such a divorce if the party takes up a temporary residence in the state merely for the purpose of getting a divorce.

If a woman marries again after obtaining such a divorce she may find herself without any of the rights of a wife if she and her new husband afterwards move to a state other than the one where the divorce was granted; and, if anyone chooses to make an objection, the children of the second marriage may be prevented from inheriting property belonging to their father.

Where the wife sues her husband for an absolute divorce, she has a right to ask the court to compel him to pay her lawyer's fees and, if the divorce is granted, to pay her a reasonable amount for her support during the rest of her life. At the husband's death the wife is entitled to her dower right in all the real estate which he owned while they were married and before the divorce.

The dower right of a wife who is found guilty in a divorce action of anything which is considered grounds for absolute divorce is cut off by the decree of divorce; and the same is true of a husband's right to courtesy. (See § 351.)

In a suit for a divorce neither the husband nor the wife who is suing nor the other party may be required to testify to anything which would prove the right of either to a divorce. But either one may be required to testify to anything which would prevent the divorce, and either one may be called upon to testify to their marriage.

If a wife is unable to support herself during the trial, in

most states she may apply to the court for temporary alimony, that is, an allowance from her husband sufficient for her support during the trial. Alimony must be asked for during the trial of the divorce action and must be included in the decree of the divorce. After a decree of divorce has been entered it is too late to ask for alimony.

If a husband or a wife who is suing the other for divorce on the ground of unfaithfulness to the marriage vows, is himself (or herself) guilty of unfaithfulness, no divorce will be granted, but the parties will be left to the situation they have themselves created.

A divorce which was obtained by an agreement between the husband and the wife would be of no value whatever. Marriage to another after such a divorce would be no marriage at all.

CHAPTER LXIX

PARENT AND CHILD

§ 394. Duties and Rights of Father in Relation to Child

A father must support his child. He may be compelled to do so by the court if necessary, or anyone interested in the child has the same right to charge its father with things necessary for its support that a wife has. The things charged to the father must be food, clothing, lodging, medical attendance, or other things necessary to its health; and the child's protector also has a right to charge the expense of an education necessary to occupy a position in life compatible with the social standing and wealth of the child's family. The food, clothing, etc., may also be of a quality suited to its father's means.

In return for this duty the law gives the father the right to the child's services and wages until he becomes of age. A child cannot be put to work until he has reached a certain age (generally 12 or 14) by the school law, but any money he earns in his spare time is legally his father's if the latter chooses to claim it. A father may voluntarily give a child a right to his own services and wages. This is called emancipation, and is usually effected by acquiescing in the child's drawing his own wages. A daughter is emancipated when she marries.

Where Third Persons Are Concerned. If a third person injures a child in any way, the father has a right to sue for damages for the loss of the child's services. Where a daughter has been wronged a father may use this form of action to punish the man who wronged her. The loss of

services may be purely a fiction, but in such a case a father has a right to this action, even though his daughter performed only nominal services about the house.

He might also prosecute the man criminally if the daughter was under the age of consent fixed by law. This is usually under twenty-one, but varies from fourteen to eighteen in the different states. The father would still have the right to recover damages although the daughter was over the age of consent, if she was under twenty-one, or if she was over that age and living at home with him.

A father is not liable to third persons for injuries caused them by his child unless the injury was the result of the child's carelessness in performing some service for the father. As a practical matter, the father usually pays the bills rather than have the child sent to jail or put on probation.

Notes:

1. If you employ a boy or a girl under age, you should have the father's written consent to pay its wages to the child.
2. Where a neighbor's boy breaks a window, preserve your temper and settle without a quarrel.

§ 395. Duties and Rights of Mother in Relation to Child

If the father is living, the mother as a general rule has practically no rights or duties towards her child which the law will recognize. She is not called on for its support and she is not entitled to its earnings. She is not liable for any injuries which the child may cause to other persons.

Where the father is dead the mother is not obliged to support the child; instead it may become an object of charity. Where the mother does choose to support the child, in some cases she may be allowed to claim its earnings; in others she has no claim.

Where a daughter has been wronged, sometimes the courts

will give the mother a right to recover damages from the man who wronged her. Where the mother has no legal right to her services, the decision depends on the point of view which the court adopts.

In some states a man may will the guardianship of his children away from his wife at his death; in others the mother is recognized as a joint guardian of the children and given the first right to them. In case of a divorce, the courts give the children to the party whose custody they think will be for the best interests of the children.

Notes:

1. Courts rightly hold that generally the mother should have the custody of the child.

§ 396. What Duties and Rights May Be Claimed by Adopted Children

To adopt children legally it is necessary to file papers of adoption with some court, the procedure being regulated by the statutes of the state. Unless these papers are filed, the children have no rights in the property of the adopted parents and no legal right to use the parents' name. If the children have been legally adopted, they stand in the place of real children so far as the parents are concerned.

A child who has been legally adopted has a right to the same share in the estate of a parent who dies without leaving a will which an own child would have received. (See Chapter LX on wills.) In some states adopted children have the same right by law in property coming from other people to their adopted father or mother, if these are dead, which own children would have had; in others they have no right to such property.

An adopted child, in order to find out whether it is entitled to property left by its adopted parents would have to consult the law of the state where it was adopted to discover the

legal effect of the adoption. In order to find out whether or not an adopted child may take property coming to it from any relative of its adopted parents, it is necessary to consult the law of the state where the property is located, if it is real estate; of the state of which the deceased person died a resident, if the property consists of personalty.

Notes:

1. Care should be exercised in legally adopting children.

§ 397. Children as Criminals

A child must be old enough to understand the nature of its act before it can be treated as a criminal. The jury will determine, from seeing the child in court and from the testimony, whether or not it can be held responsible.

Formerly, children committing crimes were treated in much the same way that other criminals were. Then came the reform school and the children's courts, and today we have the probation system in many states.

A parent whose child is incorrigible may appear against it in court and have it put in a reform school or on probation.

A child should be trained from its very earliest years so that criminal acts and incorrigibility are impossible. No matter how kindly or wisely administered a public system of dealing with incorrigible children may be, the experience will leave a shadow on the child's after-life which the parent by wise and careful handling might have avoided.

Notes:

1. A criminal or vicious child should be a greater disgrace to its parents than to itself.

CHAPTER LXX

GUARDIAN AND WARD

§ 398. Personal Guardian

If a child's father is dead, it may be necessary to appoint a personal guardian. If the mother or any other near relatives are living, she or one of them would have the first right to the guardianship, if they were proper persons and able to take care of the child. If there is no dispute about the child's custody, it is not even necessary to go through the formality of being appointed unless there is property belonging to the child to be taken care of. If the mother or the next nearest relative is an improper person, it is safer to go through the formality of legal appointment. A child old enough to understand things (usually the age is fixed by law at twelve or fourteen) is generally allowed by the court to choose its own guardian. At common law, a child's father could always appoint a guardian for the child in his will or by a deed. In states where the equal guardianship law is in force, the mother becomes the child's guardian on the father's death. The father may appoint a guardian in any case where the mother is dead, and if the father is dead, the mother has the same privilege.

The personal guardian has a right to the custody of the child, and it is his duty to support it and to provide for its education. The guardian may take the child's wages if the child is over school age, otherwise what it may earn in its spare time. The guardian has the same right to discipline the child that the father had, and the child is required to obey the guardian. He has a right to the child's services about the house, and so on.

It was formerly the custom to apprentice children out to people to learn a trade. The professions were learned in the same way. The master generally supplied the child with food and clothing, and in return was entitled to all the child's services until he became of age. The master had practically the rights and the duties of a personal guardian in respect to the child, except that he was required to teach it his own trade or profession. A master generally had the right to administer corporal punishment when he deemed it necessary.

Notes:

1. It is not necessary to appoint a personal guardian for a child unless there are no near relatives to act in that capacity, or unless the child would otherwise fall into the hands of a person who is morally or otherwise unfit to bring it up.

§ 399. Guardian of Property

Where property belongs to a child, it is usually necessary to appoint a guardian of the property. The father, if he is living, is entitled to the appointment. If not, any near relative may apply and, if the court considers him fit, it will appoint him. Otherwise the court will appoint whom it considers fit. The child if old enough (usually about twelve or fifteen), may choose his own guardian, and if the court approves the choice it will appoint that person.

If the property is left to the child by will, the person making the will may appoint a guardian to take care of the child's property.

A bond is always required from a guardian of property. He must manage the child's property carefully and keep it in good repair. If there is any surplus income over what is needed for the child's support and education, or if the income was to be accumulated, the guardian must invest the amount in such securities as are allowed by law for such investments.

These are strictly limited to those known as gilt-edge securities, and if the guardian invests in any others he will be personally liable for any loss, while still obliged to turn over to the child any gain that he makes in so doing. He may, however, without the danger of such liability, invest property left by will in any securities expressly permitted by the will.

If it becomes necessary at any time to sell any of the property in order to protect the child's interests, the guardian should apply to the court for permission to do so. If at any time the income from the estate ceases to be large enough to support and educate the child, the court's permission must be obtained before spending any of the principal.

A guardian may always apply to the court to have any doubtful provision of a will or a deed interpreted to him. In any doubtful case it is safer to do this and to get the court's permission to do anything necessary.

Notes:

1. A trust company is the safest guardian for property belonging to a child.

Part XIV—Suretyship

CHAPTER LXXI

THE CONTRACT OF SURETYSHIP

§ 400. Definition

The contract of suretyship is a contract to be responsible for the debt, default, or miscarriage of another. There are two kinds of such agreements:

1. One is an agreement to be responsible personally if the debtor fails to pay; it may be enforced just as soon as the debt falls due and is not paid. This is the contract of suretyship proper.

2. The other is a guaranty that the other party will pay his obligations, and is called a contract of guaranty. In this case, the person with whom the agreement is made must sue the debtor before he can collect from the surety.

The party assuming the responsibility is called the surety or guarantor.

The party who is primarily liable is called the principal debtor or obligor.

The party with whom the agreement is made is called the creditor or obligee.

The party who indorses negotiable paper is not called a surety, though his responsibility is similar. An indorser's responsibility is governed by very different rules from those relating to sureties. (See § 160.)

§ 401. Nature of Contract

The contract of suretyship is generally part of the original contract between the parties, and usually consists of signing some paper such as a bond or note as surety along with the maker of the original obligation. If a man signs an executor's bond along with the executor, he becomes a surety for the faithful performance of the executor's duties.

The contract of guaranty is a separate agreement in the nature of an offer to be responsible for the extension of credit, or a separate contract written on the back of some other agreement. If you write to Paul Jones asking him to extend credit to John Doe, and stating that you will see him paid, or if you write "I guarantee the within contract" on the outside of a contract and sign your name, you become a guarantor.

Many men have come to grief through their careless willingness to become responsible for others. Long ago Solomon said: "A man void of understanding striketh hands and becometh surety in the presence of his friend." It is wrong for any man to become responsible for the financial mishaps of another unless he can afford to lose the money. When men who cannot afford to lose the money sign as sureties, they take chances they have no right to take. There is always a risk involved or the surety would not be demanded.

Notes:

1. Do not take any surety risk for another which you cannot afford to pay if required.
2. Do not ask a friend to be your surety unless the friend can afford to lose the money.

§ 402. Written Contract

The contract of suretyship or guaranty must always be in writing in order to be enforced. It is one of the classes of contracts specified in the Statute of Frauds, i.e., a promise

to answer for the debt, default, or miscarriage of another. (See § 41.)

If a person agrees to pay outright for something to be done for another, or goods to be delivered to another, this is not a contract of suretyship and need not be written. For instance, if John Brown tells a grocer to deliver groceries to James Smith and he will pay for them, this is not a contract of suretyship or guaranty, but an outright agreement to pay on the part of John Brown—and the charge should be against Brown and not against Smith. But if Brown should write to the grocer, "If you will sell groceries on credit to Smith, I will pay for them if he does not," this is a contract of guaranty and must be in writing. Brown is promising to pay only in event that Smith does not.

In the first case the original charge on the grocer's books should be against Brown who bought them for Smith.

In the second case the goods are charged to Smith and Brown has no responsibility unless Smith fails to pay.

Notes:

1. If you sell goods on credit, know exactly to whom the goods are to be charged.
2. If you sell with a guaranty, be sure the conditions are stated in writing and signed by the guarantor.

CHAPTER LXXII

THE CONTRACT OF SURETYSHIP (CONTINUED) [1]

§ 403. Parties

There are three parties to a contract of suretyship—the creditor or obligee; principal debtor or obligor; and the surety or guarantor.

The surety must be competent to contract. He is the one who incurs responsibility under the contract of surety; hence, it is essential that he be competent to bind himself. (The reason for taking a surety may have been because the principal was not competent to contract.) The promises to be responsible for the debt of the obligor must be made direct to the obligee or the surety will not be a party to the contract. Signing a note or paper as surety is, however, a sufficient promise to the obligee. (See §§ 155, 160.)

Notes:

1. The surety, before signing, should think: "Can I pay this, if I have to?"

§ 404. Consideration

The contract of the obligee with the principal debtor or obligor is the consideration for the surety's promise. If it is a contract of guaranty, the consideration is the giving of credit to the principal debtor. If a bond or note, it is the furnishing of the money for which the bond or note was given. In the case of a bond for the faithful performance of the duties of an officer, the enjoyment of the office is the consideration or in the case of a bail bond the freedom of the prisoner is the consideration for the agreement of the surety.

[1] For form of guaranty contracts, see Chapter LXXXII, Forms 11, 12.

If the credit has been given to the principal debtor *before* the contract with the surety or guarantor, there is no consideration for this second contract and the surety is not bound. In such a situation, to make a valid contract and hold the surety the creditor or obligee must pay the surety something, remit something to the obligor, or extend the time of payment, so that there may be a good consideration for the agreement of the surety. (See § 38.)

Notes:

1. If you are selling on a guaranty, have a written contract showing that you grant the credit, in consideration of the guaranty.
2. If the surety comes in after the credit has been granted, there must be a new consideration.

§ 405. Delivery and Acceptance

A bond, note, or paper of similar nature, which is indorsed or guaranteed, must be delivered to the obligee and accepted by him before it becomes a contract and the surety becomes liable on it. Simply receiving the paper, however, without any comment, is a sufficient acceptance.

In a contract of guaranty, the creditor must notify the guarantor that he accepts his offer and will extend the credit asked for in reliance on his guaranty. Even where the creditor himself asks for the guaranty, he must still notify the guarantor that credit has been extended.

If the guaranty is for all sales during a certain period of time, such as a year, the creditor should notify the guarantor at once that he has granted the credit, and at the end of the period he should notify the guarantor again of the amount of credit he has granted during the year.

Notes:

1. Before you deliver goods on a guaranty notify the guarantor that you take him as security.

CHAPTER LXXIII

RIGHTS OF SURETY

§ 406. Notice

A surety is not entitled to notice of the failure of the obligor to pay the debt or perform his duty before the obligee may sue him and hold him liable. If the debt is not paid, or the prisoner on bail escapes, or the cashier absconds with the funds, the surety is liable at once. This is because a surety makes himself one with the original obligor.

In many states, on the other hand, a guarantor must be given notice of the failure of the person to perform what he has guaranteed. The creditor, or obligee, must also, where the contract is one of guaranty, enforce any security which he may have and bring suit against the obligor before he can turn to the guarantor to collect what still remains due. In the case of negotiable instruments with indorsement, the indorser differs from a surety in that there must be demand of payment and notice that it has been refused, in order to hold him liable.

Notes:

1. A guarantor must have prompt written notice if the obligor falls down.

§ 407. Reimbursement

After a surety has paid the debt, he is entitled to turn around and collect it, if he can, from the obligor, who had incurred the original obligation. Instead of paying the debt the surety may, if he chooses, apply to a court of equity to compel the obligor to pay it, and to have any security which the obligor may have given to secure the debt sold to pay it.

He is then liable only if the obligor is absolutely unable to pay and any existing security does not sell for enough to satisfy the debt.

If the creditor releases the obligor from payment, he releases the surety also. If, however, at the time he releases the debtor, the creditor states that he reserves his right against the surety, and so notifies the surety, the surety remains liable, but after the surety has paid the debt he may collect it himself from the principal.

§ 408. Extension of Time

Merely extending the time to pay a debt without receiving any new consideration for it will not release the surety, because the agreement to extend the time in such case could not be enforced. But a valid extension, based on a consideration, would release a surety or guarantor.

Notes:

1. If a debt is guaranteed, a release or extension may let the guarantor out.

§ 409. Subrogation

In addition to his right to recover from the original debtor anything he has paid on the contract, the surety has the right to be put in the creditor's place, so far as remedies against the debtor are concerned; that is, the surety is entitled to all the creditor's rights against him, including the right to enforce any security for the payment of the debt. This is styled the right of subrogation.

If the creditor gives up any security without the surety's consent, to that extent he releases the surety from his obligation. For instance, if the creditor has a mortgage as security for the payment of the debt, and releases part of the land subject to the mortgage, he will be entitled to collect from the

surety only the amount of the debt less what the land so released was worth.

A surety must usually pay the debt in full before he can demand to be put in the creditor's place.

Notes:

1. It is not safe to make any shifts or changes in the security without the surety's consent.

§ 410. Contribution

A cosurety is one who is equally bound with another for the debt, default, or miscarriage. Usually both sureties sign the same instrument at the same time, but this is not essential.

If there are other cosureties under the contract, the surety who pays the debt is entitled to recover from each of them a proportionate part of what he has paid. The creditor may not release any of them without securing the consent of all the others. If he does so, it will have the same effect as releasing any part of the security and will discharge the obligation of the remainder of the cosureties to that extent.

§ 411. Defenses

If the creditor cannot enforce the contract against the debtor because of some defect in it, he cannot enforce it against the surety either. This statement does not apply where the creditor cannot enforce the contract because the debtor was under age, or insane, or suffering under some disability which by law made him incapable of contracting. In such a case the very reason for having a surety was to protect the creditor from loss through such disability and the surety is not released.

Any fraud on either the principal debtor or the surety would be a good defense to an action to enforce the contract against the surety.

A guarantor is not liable if he is not notified of the debtor's default, when the amount of credit extended has been indefinite. When the debt guaranteed is of fixed amount due on a certain day, the guarantor may be liable, though not notified.

§ 412. Discharge

The surety can be held to the contract only as he made it. If the creditor and the principal debtor agree to make any change in it, they must get the surety's consent or he will cease to be liable. If the surety is not released by delay in collection, the original contract stands. If the surety wants to prevent the delay, he must notify the creditor to enforce payment or must himself bring suit to do so.

If the creditor releases the principal debtor or any of the security given by him for the payment of the debt, he loses his rights against the surety to that extent, as has been explained in § 407.

A surety on a bond for the faithful performance of the duties of some responsible position, will be released from liability if the employer keeps the person holding it in his employ after he has discovered any dishonesty in his dealings.

In some states the guarantor or surety may give notice to the creditor to enforce his rights against the principal debtor when the contract falls due, and if the principal debtor, though fully able to meet the obligation at that time, afterwards becomes unable to do so, the creditor cannot enforce the liability against the surety.

Before any credit has been extended in reliance on his promise, a guarantor may give notice to the person from whom he has requested credit that he has changed his mind and refuses to be liable for the party for whom he asked the credit. He cannot thereafter be held responsible for any credit which may be extended.

Death. If the obligor dies before he has entered upon the

official duties for which a bond was given, or before he has received any money or taken advantage of any credit to which he was entitled under the agreement, there is of course nothing to hold the surety for. After the principal obligor has incurred any liability under the agreement, the surety becomes liable and remains so even in case of the principal obligor's death.

If the surety himself dies, his obligation is not discharged but his estate still remains liable on the contract. It must be enforced against the other sureties first, however. After the death of a guarantor, no further credit may be extended in reliance on his guaranty, but his estate remains liable for what has already been given.

Notes:

1. The creditor on an obligation should enforce it within a reasonable time after it falls due, in order to be sure of his rights against the surety or sureties.
2. Any changes in an agreement without the sureties' written consent to them may release them.

Part XV—Bankruptcy

CHAPTER LXXIV

ENFORCING PAYMENT OF DEBTS

§ 413. When the Creditor Has Some Security for the Debt

Security may be in the form of a mortgage on land or on personal property, or it may consist of a statutory lien, or of a right to reclaim property under a contract of conditional sale. (See § 80.)

If the security is a mortgage, and the debtor has neglected or definitely refused to make the payments agreed upon, the proper course is to foreclose. Should the mortgage provide that on default the holder may sell the property, a foreclosure proceeding is still necessary. In order to give a clear title, the suit to foreclose must be brought and all legal formalities complied with before the property is sold. It must be sold at public auction, unless the mortgage permits a private sale, the former being the wiser method to follow in all cases, as afterwards no questions concerning the legality of the sale will arise.

When the mortgage is on real property consisting of several lots or parcels, they must be offered separately, unless the mortgage specifically permits that they be sold as a whole.

Where there is a lien on property of any kind, such as a mechanic's or an employee's lien for personal services, the statutes which provide for the safeguarding of this class of claims also provide a method of collecting them. Common carriers have a lien for the freight upon goods carried; ware-

housemen upon the goods stored, for storage charges; tailors have liens on the suits made up from cloth given them; and carpenters upon the finished product of their labor, etc. The statutes bearing upon each case should be examined and the method of enforcement strictly followed, keeping in mind that the lien laws of each state vary in kind, number, and procedure.

In the case of a conditional sale, properly registered, the ownership remains in the seller until the full purchase price has been paid, or, if the agreement of sale stipulates that title should pass on the payment of a smaller amount, until that has been paid. Where the purchaser fails to make the agreed payments, the seller has to reclaim the property. If it is not surrendered peaceably, he may have to resort to legal proceedings to recover possession. (See Form 10.)

Notes:

1. The matter of giving credit and avoiding loss is one of the most difficult business problems. Large houses have a credit manager who by specializing becomes very skilful in judging men.

§ 414. Where There Is No Security for the Debt

If a debt is unsecured, it is necessary to bring suit and to get a judgment against the debtor before the court will grant an execution, i.e., an enforcement of the judgment. An execution takes the form of an attachment and a sale by the sheriff of the debtor's property, advertised in the manner required by law. Household furniture and the tools used in following a trade are generally exempt from seizure. The articles thus exempted are more definitely enumerated by the statute covering this matter and vary in each state.

An execution generally holds good until the amount for which it was issued has been wholly satisfied. It can be enforced only against property within the jurisdiction of the

court granting it, and if the fact should appear that there is property belonging to the debtor in another jurisdiction, it is necessary to file a transcript of the judgment there and to take out another execution. It may be necessary to obtain a new judgment for property outside the state.

No proceedings for the collections of debts are satisfactory. If they are harsh, poor people are oppressed; if lenient, dishonest people defraud those who trust them.

In business circles good credit is becoming a matter of character and achievement, and a day may come when the man who does not pay his debts and the man who embezzles will find it equally impossible to do business.

§ 415. Attempts to Defraud Creditor

In the case of fraud, the law generally allows execution against the person of the debtor, i.e., arrest and imprisonment. If there is reason to believe that the debtor intends to escape or to convey his property out of the jurisdiction of the court, the first step in the action to collect the debt should be an application for an order of arrest. The debtor must then give bond or go to prison. In bringing such proceedings, a reputable attorney should be consulted.

If at any time during the suit the debtor attempts any fraudulent disposition of his property, he may be imprisoned and if as a consequence of such fraud there is no property to sell, he may be kept in prison until he pays the debt.

Where a debtor has conveyed or assigned property with intent to defraud any of his creditors, the defrauded creditor may apply to the court to set aside the transfer. Even a life insurance policy taken out for a larger amount than the circumstances of the debtor warranted at the time, or for the express purpose of defrauding his creditors, or which has a cash surrender value to the debtor, may be used to satisfy claims.

In many states the laws against fraudulent debt are not so severe and are difficult to enforce. It is probable that more money is lost by fraudulent debts than by all the forms of outright theft combined.

Notes:

1. Before trusting money or property to another, be sure that he is trustworthy. If in doubt, decide whether you can afford to lose the money. If you decide that you can, do not worry about it later.

§ 416. The Modern Theory of Credit

In business credit-giving is not a matter of favor but of business discretion. In the larger establishments the credit department is presided over by experts who investigate those who seek credit and, after ascertaining what character, business ability, and available assets the applicants possess, determine to what extent it is prudent to give them credit. The result of this procedure is that in each line of business, those who are unreliable, slack in business, extravagant in habits, and careless about obligations, find increased difficulty in obtaining credit and are ultimately forced out of business. On the other hand, those who are honest, careful, and methodical in their business dealings get the credit to which they are entitled and their good name becomes more valuable.

Any business man, whether he seeks credit or gives it, should inform himself through some of the modern works on credit and collections of the practice in regard to granting credits and making collections. As a result of careful management the losses from bad debts and business failures tend to become less, and by a survival of the fittest the modern business house in its practice becomes more careful, more economical in management, more practical in its conduct, and more ethical in its relations to its customers, its employees, and those from whom it buys.

When a business house finds itself in difficulties, the credit men representing its creditors get together and if on careful examination there is any reasonable chance of those in charge pulling through, the creditors usually extend credit and prescribe a course of conduct that will in most cases restore prosperity. If instead, they find hopeless mismanagement, extravagance, or dishonesty, they decide on what legal steps are to be taken to save as much as possible for all the creditors. This result is usually sought through bankruptcy proceedings. In consequence the subject of bankruptcy has much importance in modern business life.

Notes:

1. In business a good character helps the debtor obtain credit. The creditor needs to be a good judge of character to avoid bad debts.

§ 417. Insolvency

Insolvency and bankruptcy are not synonymous. Any man or any business establishment is insolvent when an accountant's statement shows that the liabilities are greater than the assets. It is possible, though, for a business to run for years in this condition. If an insolvent business can scrape together enough money to meet bills as they come due, it can go on indefinitely and none of its creditors can institute legal proceedings. It would be possible for a skilful business man to start a business on borrowed capital, in which case it would be insolvent from the start. If his borrowed money did not come due for some time, he meanwhile could do business and make money and when his loans came due, pay part and renew the balance until he succeeded in accumulating assets in excess of his indebtedness and making the business solvent.

Notes:

1. It is unsafe to start a business on borrowed capital.

§ 418. Bankruptcy

Bankruptcy, on the other hand, is fatal to a business. Bankruptcy means that a man or a business has been adjudged by a court to be a bankrupt and that control of the business has been put into the hands of a trustee or receiver appointed by the court, to make such disposition of it as may be for the best interests of the creditors. A business is usually insolvent when it goes into bankruptcy, but it would be easy to mismanage a solvent business in such a way that it would become bankrupt.

The bankruptcy laws are enactments of Congress designed to afford a means of distributing fairly among creditors the assets of a failing business. Before these were adopted the laws in each state on the collection of debts differed, and when a business house failed there was strenuous competition among its creditors to see who could save himself and the result was much fraud and unfairness. Now, all of these local abuses have been superseded by the national laws administered by the federal courts, and the result is better for both creditors and debtors.

The great advantage to the debtor is that if he has been only unfortunate and not fraudulent, he may after the settlement of his affairs obtain a discharge from all his past debts and start afresh to build up a new credit, with the assurance that as soon as he gets a little money it will not be taken from him on some old claim.

The advantage to the creditor is that all fare alike, and no one is preferred in his claims. The proceedings also give pause and opportunity to make a compromise to the advantage of all parties.

Notes:

1. An honest debtor who deals fairly with his creditors, can usually make a settlement with his creditors without bankruptcy proceedings.

CHAPTER LXXV

BANKRUPTCY PROCEEDINGS

§ 419. Voluntary Bankruptcy

Any person may file a bankruptcy petition on his own initiative asking the court to adjudge him a bankrupt. It is immaterial how small the amount the person may owe when he makes his application. The expense of the proceedings would, however, be an effectual bar to small debtors, and it is not usual for anyone to make voluntary application unless he is insolvent and is being pressed by creditors. Under such circumstances, it is sometimes better for a person, when he can see no other way out, to anticipate and by so doing to end suspense and unavailing struggles to stave off the inevitable.

In order to go into voluntary bankruptcy, the debtor files a petition in the federal court for his district, stating the number and amount of his debts and the amount of his property. The creditors are then served with notice and with copies of the petition, and the further proceedings are the same as in cases of involuntary bankruptcy.

An insolvent debtor may assign his property to someone for the benefit of his creditors, instead of going into bankruptcy. The proceedings necessary to take in making an assignment for the benefit of creditors are prescribed by the state laws. The reason that this is rarely done is that when such an assignment is made, any one of his creditors may commence proceedings in bankruptcy, and then the whole matter must be settled in the bankruptcy court.

§ 420. Involuntary Bankruptcy

A person may be adjudged an involuntary bankrupt when he owes not less than $1,000 and has committed an *act of bankruptcy*. The following are the legal acts of bankruptcy:

1. To convey, transfer, conceal, or remove, or to permit to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors or any of them.
2. To transfer while insolvent any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors.
3. To suffer or to permit, while insolvent, any creditor to obtain a preference through legal proceedings, and not have vacated or discharged such preference at least five days before a sale or final disposition of any property affected by such preference.
4. To make a general assignment for the benefit of his creditors, or being insolvent to apply for a receiver or a trustee for his property, or to have had a receiver or a trustee put in charge of his property because of insolvency.
5. To have admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

The person who has committed any such act of bankruptcy is liable to have a petition filed against him asking that he be adjudged a bankrupt at any time within four months thereafter.

§ 421. Persons Who May Bring Bankruptcy Proceedings

Bankruptcy proceedings may be brought by any one or more creditors to whom the alleged bankrupt owes not less than $500, if the total number of creditors is less than twelve.

If there are twelve or more creditors, three or more must join in bringing the proceedings and their claims must aggregate more than $500.

§ 422. Persons Who May Become Involuntary Bankrupts

Bankruptcy proceedings may be brought against any natural person, except a wage-earner or a person engaged chiefly in farming, and against any unincorporated company and any corporation owing debts to the amount of $1,000 or over, except a municipal, a railroad, an insurance, or a banking corporation. A municipal corporation, a railroad, an insurance company, or a bank cannot be thrown into bankruptcy for reasons of public policy. In event of any of these institutions becoming insolvent, creditors can apply to a court of equity for the appointment of a receiver to take charge of the assets and any business on behalf of the creditors.

CHAPTER LXXVI

BANKRUPTCY PROCEEDINGS (Continued)

§ 423. How Bankruptcy Proceedings Are Instituted

There are two kinds of proceedings by which creditors can force a closing out of the bankrupt's business and an application of his property to the payment of their claims. The first is to bring a suit in equity to have a receiver appointed, who then takes charge of the business, sells the property, and pays off the claims under the direction of the court. The second method is to go into the federal court and to bring bankruptcy proceedings. All bankruptcy proceedings must be brought in the United States court. No state court has jurisdiction in bankruptcy.

The difficulty with the proceedings in equity is, that if anyone else wants to start proceedings in bankruptcy, the equity proceeding fails, and all must come in under the bankruptcy proceeding.

In bringing bankruptcy proceedings, the creditor or the creditors (as the case may be) file a petition in the federal court located in the judicial district where the bankrupt resides or has his place of business, or in a district where any property belonging to the bankrupt is located. A copy must be served on the bankrupt.

The petition usually asks for the appointment of a receiver to protect the property until a trustee can be elected. The receiver is appointed by the court and is given charge of the bankrupt's property until the first meeting of creditors is called.

If the bankrupt defends the proceeding, it will be necessary to have a jury trial before the court can pronounce him a

bankrupt. Proceedings in bankruptcy are usually conducted before a referee in bankruptcy appointed by the court. Usually such suits are not defended. After the expiration of the twenty days which the bankrupt is given in which to make his reply, the court enters a decree adjudging him a bankrupt.

The bankrupt is then required to file a list of all the claims against him. The court may disallow any claims which it believes to be unfounded. A meeting of all creditors whose claims have been allowed is then called, and they elect a trustee to take charge of the property. The trustee must be elected by a majority of the creditors as to both number and amount. That is, he must be chosen by a majority of all the creditors whose claims have been allowed, and by those holding a majority in amount of the claims.

Creditors who have some security for their claims are not allowed to come in to vote on the bankruptcy proceedings, so far as those claims are concerned, unless the security is not large enough to cover them. In this latter case they may vote on the amount of the claim over and above the value of the security, but not on the full claim.

The creditors may require the bankrupt to submit to an examination as to his property and any other matters pertinent to the bankruptcy proceedings.

As soon as the trustee has been elected, the creditors should proceed to file their claims with him. The proof of a claim consists of an affidavit by the creditor stating the nature and the amount of the claim, that it is due and owing, and what security, if any, he has for it. If it consists of a promissory note, or a written instrument, he must file the instrument with the affidavit.

§ 424. Rights of an Individual Creditor in Such Proceedings

The bankruptcy proceedings are carried through only in case the debtor and his creditors can come to no compromise.

Very frequently the debtor offers to compromise for so many cents on the dollar, and if this is a fair offer it is usually better to take it than go through with the long and costly procedure in bankruptcy.

Any creditor who thinks that the bankrupt is not offering enough may offer to take over the stock himself and to pay the other creditors a higher dividend. This usually brings a higher offer from the bankrupt if he is trying to defraud his creditors. The creditor making the offer must also pay the expenses of the proceeding up to the time the compromise is made.

Notes:

1. It is always better to compromise instead of resorting to a bankruptcy proceeding if the offer is at all a fair one. The creditors practically never receive a larger proportion of their claims by delay; usually, because of the heavy expenses, they receive much less than if they had settled the matter in the first place.

§ 425. Rights and Duties of Receiver

In bankruptcy proceedings a receiver is appointed temporarily to preserve the property until a trustee can be elected. He does not conduct the business, but merely takes care of the goods, pays taxes and other dues, and hires a caretaker if necessary to look after the premises during the interim between the commencement of the action and the election of the trustee. If there are any goods in stock which are of a perishable nature or would soon go out of style and become unsalable, the receiver may, with the court's permission, sell these and deposit the money realized in a bank to await the election of a trustee. It is the receiver's duty to apply to the court for such permission.

The receiver must give a bond for the faithful performance of his duties. He is entitled to fees based on a percentage of the amount of property handled.

§ 426. Rights and Duties of Trustee

The trustee must give a bond, the amount of which is fixed by the creditors at their meeting, or if they fail to do so, by the court. The creditors may at any time require that this bond be increased. The bond must have two sureties. The trustee is responsible only for his own misdeeds, not for anything which the bankrupt does.

The trustee's first duty on his appointment is to get together all the property of the bankrupt, to collect any debts owing to him, by suit if necessary, and to turn everything into money in the quickest manner possible, without unduly sacrificing the assets. As a general rule, if the property of the bankrupt is in the form of a business, it is necessary to keep the business running for some time in order to realize as much as possible.

It is the trustee's duty to conduct this business in whatever manner he considers the most advantageous, and to sell the property for the best price he can obtain. The trustee must dispose of all leases, and everything else owned by the bankrupt, except the property exempted from the claims of creditors by the state laws.

From the receipts he would pay the creditors, taxes due, cost of preserving the estate, filing fees, court costs, an attorney's fee, and wages due. Servants and employees for three months prior to proceedings are entitled to be paid before other claims are settled. Then he would discharge any secured debts, to the value of the security.

If after paying these items there remains enough to pay 5 per cent of the total amount of all the other claims, the creditors are entitled to have a dividend declared within thirty

days after the debtor has been adjudicated a bankrupt. If not, they must wait until the trustee has collected a sufficient amount.

Afterwards the creditors are entitled to have dividends declared from time to time until the entire amount of all the property in the trustee's hands has been paid out. This may be a tedious process.

When he has distributed the final dividend, the trustee makes up his accounts and presents them to the court asking a discharge. He is then entitled to fees based on the value of the property which has gone through his hands.

§ 427. What Debts Remain Undischarged

After a discharge in bankruptcy, the bankrupt still remains under obligation to pay any debts which were not due at the time of the discharge. He would be liable for rent on a lease not yet expired which fell due after the discharge in bankruptcy. It is the trustee's duty to sell such a lease if possible, but the bankrupt remains liable to the landlord in case the purchaser fails to pay.

The bankrupt should take care to include all debts due in the list which he files, because any debts not mentioned there remain valid claims against him after his discharge. Of course, if the creditors come in themselves and prove their claims on the proceedings, the bankrupt is no longer liable for them. Also, these creditors may have a right to have the proceedings set aside.

There are certain claims which the law provides that a proceeding in bankruptcy shall not discharge. It does not cover taxes, nor the duty to support wife and children. Nor does it release the bankrupt from claims against him because of injuries to other people or because of fraud or wrongful acts. If a bankrupt's wife has divorced him, it does not release him from his duty to pay alimony.

§ 428. Rights and Duties of Bankrupts in Bankruptcy Proceedings

It is the duty of the bankrupt to submit to examination if his creditors require it, to hand over to the trustee in bankruptcy all property in his possession, with the exception of what he is entitled to claim as exempt, and to give full information of all his affairs in order to aid the trustee in straightening out matters.

The bankrupt may offer to compromise the claims against him by paying a certain amount on the dollar. He must file a list of all his property and all the claims at the same time. If a majority of his creditors, who also hold a majority in amount of the claims against him, sign a written consent to the compromise and the court approves it, the claims will then be compromised and the bankruptcy proceedings dismissed. Where a compromise is arranged, the bankrupt must pay the expenses of the proceedings up to the time of the arrangement. A fair compromise should always be accepted.

A bankrupt cannot be subjected to arrest for any claim involved in the bankruptcy proceeding, except for contempt of the court having charge of the proceeding or for attempting to escape from its jurisdiction so as to avoid an examination. He is entitled to claim as exempt such property as the state law allows him. This usually consists of necessary household furniture and wearing apparel and such tools as are necessary for carrying on a trade.

When the bankrupt has given an honest account of all his debts and belongings, and has done all in his power to aid the proceedings, he is entitled to a discharge. This relieves him of the legal obligation to pay in full any of the debts which were included in the proceedings in bankruptcy. He cannot be proceeded against at law unless he acknowledges in writing that such debts are still due and owing. But the moral obligation to pay them still remains, and if at any future time he finds

himself able, he should feel in honor bound to pay the remaining amounts due.

It is important that the bankrupt should apply for his discharge within the year after filing his petition, or his right is gone forever, and he will still be liable for the full amount of his debts.

If there has been any fraud in bringing the proceedings, or in concealing property which ought to have been given up for the benefit of creditors, any of the defrauded creditors may come in within one year after a discharge has been granted and have it revoked.

Notes:

1. Honesty is always the best policy in bankruptcy proceedings.

Part XVI—Taxation

CHAPTER LXXVII

LAYING TAXES

§ 429. Who Has the Right to Lay Taxes

According to the theory on which our government is founded, taxes may be laid on the people only by themselves. As it is impossible for them to do this literally, the right has been delegated to the state legislature composed of members duly elected by the people. The state legislature therefore has the supreme taxing power.

The federal government was established by concessions from the several states of various powers which it was admitted could be better exercised by the nation as a whole than by the separate states. All the powers of the federal government came originally from the state legislatures. Among these powers was the power of taxing within certain limitations.

The federal government can lay taxes only (1) to cover its own expenses, and (2) to carry out those acts and to perform those duties for which it was formed by the constitution; namely, "to provide for the common defense, to promote the general welfare," and to pay the debts of the United States incurred for these purposes.

Within the state itself, the legislature usually delegates the right to lay taxes for local purposes to counties, cities, incorporated villages, and divisions formed for special purposes, such as school districts and road districts.

The power of the state legislature to lay taxes is limited only by the provisions of the state constitution and the rule which governs all taxation in this country—that the tax must have been voted at a regularly called and properly constituted session of the legislature, and that the persons taxed shall have an opportunity to be heard in their own behalf.

The federal government has only the powers heretofore enumerated. Any other body has only those powers expressly given it by the legislature and which are embodied in a duly enacted statute.

§ 430. Purposes for Which Taxes May Be Laid

State taxes may be laid to cover any of the necessary expenses of the state; such as the administration of justice, the maintenance of public education, or the construction and the maintenance of public highways and waterways; in short any public service which the citizens of the state choose to assume. The federal government is usually charged with the expense, or the major part of the expense, of maintaining and improving navigable rivers and harbors; while the state governments take charge of smaller bodies of water within their own boundaries.

Small divisions such as school and road districts may tax only for the purpose of keeping up the roads or the schools within the district. Counties and cities are allowed to tax only for their own local purposes, and then only for those which have been specified in the statute giving them the right to tax.

The purposes for which the federal government may lay taxes have been mentioned: to defray its own expenses; to provide for the common defense—that is, by maintaining an army and a navy, with fortifications and army posts where necessary; to promote the general welfare, a clause which covers all necessary expenses for the carrying out of legislation deemed to be for the welfare of the country as a whole,

such as post-offices, banking and currency systems, etc.; and lastly to pay debts which have been incurred for any of these purposes.

The federal government has no right to lay a tax for the benefit of any particular part of the country. If the tax bill should state that the tax was to be laid for a particular district it would be unconstitutional, and taxpayers may refuse to pay it. In practice many taxes *are* laid for the benefit of a particular part of the country; but if the tax is stated to be for a particular purpose throughout the country as a whole, it is valid, even though that purpose as a matter of fact affects only a few states, or even only one.

§ 431. Methods of Taxation

There are two methods of laying taxes. The federal government in imposing a tax generally prescribes a rate to be laid on property, or on certain transactions. The government then collects the tax and applies it to the various purposes for which authorization has been given in the Constitution.

The state government, on the other hand, makes an appropriation to meet some particular need of the government and the tax rate is determined accordingly.

Taxes laid by the federal government are of two kinds:

1. Direct taxes may be laid on persons and property, and these must be proportioned to the population as determined by census.
2. Indirect taxation may be imposed, such as duties on imports and excise taxes on goods produced within the country (usually liquor and tobacco); and these must be uniform; that is to say, all articles of the same nature must be taxed alike.

By the Sixteenth Amendment to the Constitution, Congress was given the right to lay a tax on incomes, and to disregard

the former constitutional provision that a direct tax shall be proportional to the population.

In some states, all property, real and personal, is subject to equal taxation; in others, only certain forms of property are equally taxed, while certain kinds are exempt. In New York State, for example, the rate of taxation is different for different kinds of property. The legislature may classify either persons or property for the purpose of taxation, and lay taxes equally on all within a particular class. If the classification is a logical and general one, the tax is constitutional and enforceable.

There must always be some reasonable division of persons or of property for the purposes of taxation, and the tax must be laid equally on all within each group. Singling out any separate persons or pieces of property and laying on them the whole tax or a greater amount of the tax than on others which might reasonably be supposed to fall within the same class, is unconstitutional and such a tax cannot be enforced.

§ 432. Extent to Which Persons May Be Taxed

There is practically no limit to the extent to which persons or property may be taxed. For example, if a man owns a piece of property, the federal government may tax it for national purposes. The state government may also tax it for state purposes; the county for county expenses; and the school district may lay still another tax on it. All of these taxes would come out of one piece of property. Each one of the territorial divisions may tax the property several different times in one year for the different purposes for which they are allowed to lay taxes.

It is usual for states to tax corporations on their capital stock, and also to tax stockholders on the stock in their possession. This amounts to a double tax on the same stock. The stockholder usually pays the tax in the end, because even if the

corporation has assumed the payment, taxes or any other burden tend to depreciate the value of the stock.

A person may pay taxes on his real and his personal property to the state; an income tax on the income from them to the federal government; another tax to the state on his right to engage in an occupation; and in addition to these a poll tax if he is a voter. The taxes enumerated are all direct taxes.

Indirect Taxes. States very frequently impose a tax on the right to transfer stock, or to inherit property. The federal government lays a duty on imports. The amount of the duty is, of course, added to the price of the goods and is paid ultimately by the consumer. Tobacco and alcoholic liquors pay special revenue taxes. In case of war or special need to raise funds for the expenses of the national government, it is common to impose stamp taxes; that is, to require government stamps to be placed on various legal and business documents and on specified articles of merchandise.

Taxes are not necessarily paid for advantages which the taxpayer himself receives. Persons who have no children or who send their children to private schools are required to pay a school tax. Taxes on real estate may be expended on improvements that mainly benefit real estate in other parts of the town.

So long as the purpose for which the tax is laid is legal and within the powers of the body laying it, there is no limit to the extent to which taxes may be imposed. As it has been expressed, the power to tax is the power to destroy. When the national banking system was instituted, a 10 per cent tax on the circulation of the state banks made it impossible for them to issue bank notes.

CHAPTER LXXVIII

COLLECTING TAXES

§ 433. Assessment of Real Property

The federal income tax, and in some states all taxes on personal property, are based upon the sworn reports of income or lists of property required from all persons subject to the tax and submitted to the tax collector. The usual method of assessing real property, however, is to appoint appraisers to fix a valuation on the property subject to taxation. Sometimes the property is assessed at its true value; sometimes at a certain percentage of its value, as in New York City, where real property is assessed on 50 per cent of the value. This difference in methods of arriving at the value of property makes it necessary to appoint a body to equalize the taxes throughout the state; or, where the taxes are for a smaller division, for that division. The State Board of Equalizers performs this function for the State of New York, and the Board of Tax Commissioners for New York City. Throughout the state, county taxes are equalized by Boards of Supervisors. The valuation of real property is supposed to be made every year. As a matter of fact, the assessors cannot view and appraise the property every year, and the result is that they guess at values.

In assessing real property, the value of any buildings or improvements is included. If there is any restriction on the owner's use of the property when he takes it, such as a right of way, or a limitation in regard to the character of the buildings to be erected on it, this is deducted from the value of the property. No charges against the property which the owner himself has created, however, are deducted.

It is the duty of the assessors to keep the books open for inspection, and to give notice to the taxpayers of a reasonable opportunity for inspection of the tax roll. Usually, the notice may be published in a local paper. Merely allowing the books to be inspected during the course of one day would not satisfy the law, as it might be inconvenient or impossible for some persons to attend at that time. In some states the assessors themselves listen to complaints and objections to the assessment; in others, a board on grievances is established, before whom these complaints are to be made.

After all complaints have been heard and adjusted, the assessors make out a warrant for the collector and send it to him together with the assessment roll.

§ 434. Assessment of Personal Property

In some states of the Union, the taxpayer is given a comprehensive schedule of personal property, which he is required to fill in with number and value, and then swear to. Those who are very conscientious do this exactly and must then pay the full rate of taxation on the amount. Those who are less conscientious, neither enumerate nor value according to the facts, and are taxed on what they report. The personal tax laws generally, if correctly entitled, would be called "laws to encourage fraud and to promote perjury." As such, they come as near achieving their purpose as any laws on the books.

In other states, the report on personal property is optional, and if the victim feels that his conscience will not let him swear to less than he has, he can show the appraiser around. That official, not desiring to offend the voters who elected him, does not look too closely nor value excessively and usually averages his neighbors in a rough way, in the same proportion, so that all are assessed below the actual amounts, but all feel that they are being relieved of most of the amounts due, and hence appreciate the friendliness of the assessor.

There are many variations of these methods, all more or less faulty, and it is not probable that taxes are paid on more than one-third of the personal property in the country. The taxes on real property cannot be evaded; the taxes on personal property are generally evaded. Men of known wealth return ridiculously small amounts of personal property. Others have country places where by understanding with the tax authorities their assessments are limited to some specified sum, far below the real value. It is possible for a wealthy man to live at hotels and to avoid any permanent residence with the obligations of tax-paying, jury duty, etc. Hetty Green managed during a long life to enjoy the advantages of living in a civilized country and evading most of her portion of the cost. Most of our citizens would be willing to pay their fair share of the taxes if their neighbors did the same. When the law punishes the conscientious and rewards the man who perjures himself, the average man follows the example of his neighbor.

It is obvious that whatever amount is evaded by one man must be made up by others, and as a matter of fact, the custom of evasion is so general that the tax rate has been raised so that it is confiscatory if anyone does report truly. A rate of approximately 2 per cent is not uncommon. If a man left his family $20,000 interest-bearing securities earning 6 per cent and paying them $1,200 per annum, and his widow returned these securities for taxation, the state would take 2 per cent or $400 and would leave the widow and children $800 to live on. In such localities, the securities are not reported and the assessors do not investigate too closely. Business men have many ways of avoiding and evading taxation and salving their consciences.

It is not a pleasant subject and it is well argued that as personal taxes are generally evaded and as it is impossible to collect with any fairness, it should be abandoned and a larger proportion of the money required by the state should be raised

by land taxes, income taxes, inheritance taxes, excise taxes, and the like. The question is too large for discussion here.

§ 435. Collection of Taxes

The collector of taxes must appoint certain days on which he will be present to receive taxes, and must give taxpayers notice of the time and the place. This is usually done by publication in a local paper.

If the taxes are not paid within the time appointed by the collector, the government has a right to sell the property and to take what is due out of the proceeds.

After trying several unsuccessful methods of collecting taxes in New York, the city now sells its claim for taxes in the form of a lien on the piece of land on which the tax remains unpaid, to the person who will take it and charge the delinquent owner the lowest amount of interest. The purchaser may, if the lien is not paid, enforce his lien as a mortgage on the land. This has proved successful, and a sale of the property under foreclosure of this lien gives a good title to the person who buys the land which the original owner can not dispute.

Part XVII—The Legal Profession

CHAPTER LXXIX

LAWYERS

§ 436. The Legal Profession

It is not possible to do much business, to acquire much property, or even to live one's life without sooner or later having to do with the law and with courts of law; and this involves relations with the legal profession.

Under these circumstances, it is well that the citizen, especially if he owns property, should know with what manner of man he has to deal when he employs a lawyer or has to negotiate or contend with someone else who has employed a lawyer. The common idea of a lawyer, the scheming attorney of fiction and the stage, is merely a caricature. His prototype is occasionally met, but the average lawyer is morally and intellectually on the same plane as the average business man, with the advantage of special training continued year after year. The better lawyer is a superior type and the law has always numbered in its ranks the best brains and best blood of our country.

It is to be remembered, however, that while the law as a profession has a peculiar appeal to, and fascination for, ambitious, intellectual young men, it also, unfortunately, appeals to a great many who are ambitious but only superficially clever; who are neither intellectual nor high-principled. The ability to prepare for and pass a legal examination is no

guarantee that after admission to the bar the young man has the wisdom, judgment, and moral insight to make him a safe adviser.

Also the legal profession is overcrowded, and this leads to an overeagerness to secure clients and tends to lower the standards of the profession. To quote from the annual address of the president of the American Bar Association:

> The ease with which admission to the Bar is secured in many jurisdictions and the attractions of a career which affords a living without manual labor have crowded the Bar with more lawyers than are necessary to do business. Of the 114,000 lawyers in the United States according to the census of 1910, a very considerable part are not needed for the due administration of justice. If that business were conducted like the business of any great industrial or transportation company which is striving for the highest efficiency at the least cost in order to compete successfully with its rivals, a very considerable percentage of the 114,000 would be discharged . . . . We at the Bar are not producers. Superfluous lawyers are mere pensioners and drags upon the community and, upon all sound economic principles, ought to be set to some other useful work. There is plenty of work for them to do on the farms of the country.

§ 437. The Domination of Precedent

It is also to be remembered that the whole education and training of the young lawyer is shaped to make him conservative and non-progressive. Any youthful ardor and enthusiasm with which he may enter is chilled by the medieval lore he must master and by the absence of any opening for initiative, imagination, or discovery. Business and the other professions have learned better ways. Even theology has shaken her garments and found new wine for old bottles. The followers of the law still hold that the fathers knew best, not only for their own times but also for ours, and youths who should be moral and intellectual leaders of their generation become apologists

for outworn laws and effete legal practice. Precedents dominate and the "case on all fours" has greater weight than the profoundest grasp of principle or the clearest demonstration of right and justice. Dean Swift cynically wrote many years ago that the law was the only calling in which the fact that a matter had once been done wrong was considered a sufficient reason why it should always be done wrong.

Both judge and advocate feel relieved of responsibility when they find a case "on all fours" with the one before them. Hence, the eyes of the law student are turned to the past, not to the future, to the search for cases rather than to the development of principles, and as a result, while all the other sciences move forward, the practice of the law is still in the ox-cart stage.

§ 438. The Conservatism of the Law

After admission to the bar, the young lawyer naturally practices what he has been taught. Self-interest holds him a conservative and opposed to progress. Vested rights and established institutions become sacred in his eyes. From the older men so trained our judges are selected, and then we marvel that progressive social legislation or legal reform finds no favor in their eyes. It is probably the most serious fault of the existing system of law that it takes thousands of our brightest young men and deliberately stifles their progressive tendencies.

To quote from a recent article in a well-known legal periodical:

> The legal profession is naturally so conservative that it is with difficulty that any innovation, no matter how meritorious, can receive anything like sufficient approval to be adopted. Every other profession in the world aside from ours has been almost remade within the last quarter of a century, while we have made practically no substantial change in our rules of procedure and practice. We con-

stantly—courts, lawyers, bar association, and everybody—complain of our cumbersome methods and the delay and expense incident to them, and yet we go on using them because we have grown up with them, and it is easier to continue to use the legal wheelbarrow and ox-cart than it is to change it for the expeditious legal automobile.[1]

§ 439. Ethical Standards of the Bar

The ethical standards of the profession are likewise distinctly medieval. The following is the ideal of the law as set forth by Elihu Root in his address to the American Bar Association, August 30, 1916:

> There is another evil arising from defective education. These half-trained practitioners have had little or no opportunity to become imbued with the true spirit of the profession. That is not the spirit of mere controversy, of mere gain, of mere individual success. To the student of the law, there comes from Hortensius and Cicero, and Malesherbes and De Seze, and Erskine and Adams, from all the glorious history of the profession of advocacy, great traditions and ethical ideals and lofty conceptions of the honor and dignity of the profession, of courage and loyalty for the maintenance of the law and the liberty it guards. It is to a Bar inspired by these traditions, imbued with this spirit, not commercialized, not playing a sordid game, not cunning and subtle and technical, or seeking unfair advantage—a Bar jealous of the honor of the profession and proud of its high calling for the maintenance of justice—that we must look for the effective administration of the law.

How far this is from the actual practice of the law anyone at all familiar with modern conditions is sadly aware. And those responsible for the lowered ethical ideals are not only the half-trained. In the same address Mr. Root says:

> On the other hand, it is the business of the lawyer to conduct a case so that his client will win. His relations to the case tend to give him a one-sided view of what is just

[1] *Case and Comment* for July, 1917.

> and fair in that case. The ardor and stress of conflict are not favorable to abstract considerations of justice. He is concerned in exhibiting the facts which will help his client; in stating the law on which his own side relies; in breaking down witnesses against him and strengthening witnesses in his favor. On each side the counsel plays the game for all it is worth, and sometimes superiority of counsel outweighs superiority of merit.

The best lawyers tacitly admit the low standards of the bar when they govern themselves by a code higher than the legal rule of ethics. It is said of Lincoln that he would never take a case when he did not believe his client to be in the right. He would not make himself the apologist for criminals who were defrauding his neighbors. There are many others in the legal profession, more than the layman knows of, who follow Lincoln's code of ethics in regard to crooked clients. It follows that if Lincoln and these who decline to aid wrong-doers are right in their position, then the rest of the profession is wrong.

§ 440. The Criminal Lawyer

To avoid being misunderstood, it should be said that there is no intrinsic impropriety under our administration of justice in any lawyer's defending any criminal. The accused man before the court has a right to be represented by counsel, to have his witnesses heard, his case presented, and to be protected from illegal pressure. It is therefore entirely proper for a reputable lawyer to represent him.

While all this is true, there is a vast difference between what an absolutely high-principled lawyer would do in the defense of a criminal and what the usual criminal practitioner will do. At the time the late President McKinley was killed his assassin was defended by one of the most able lawyers at the New York Bar. The assassin had all his legal rights protected, he had a fair trial, he had absolute justice, he was fairly

convicted, but it is not on record that any other criminal ever employed the eminent gentlemen who defended him. Malefactors of wealth do not want justice. It is certain that when such a client comes before the courts he does not employ any lawyer who will do no more than make sure that he has a just trial and present every right of defense to which he is legally entitled. Hence, most reputable lawyers fight shy of all criminal cases and leave them to men of easy conscience and few scruples as to the use of any means to defeat justice.

§ 441. Selecting a Lawyer

The man who takes an active part in life will surely have need of a legal adviser. It is much cheaper to pay a lawyer to keep one out of litigation than to fight a case in court, though this latter cannot always be avoided. Out of the 114,000 lawyers in the United States there are to be found many able, high-principled, and conscientious men who will make their clients' business their own and advise rightly, even to their own disadvantage.

In most cases the legal adviser is selected by reason of family or social connection; and possibly this is as good a way as any other. Usually those who have known a man all his life are not deceived as to his character. There are times, however, when it becomes necessary to select a lawyer without any of these influences and then the problem is not an easy one. It is usual in such cases to ask the advice of friends. The friends usually recommend someone with whom they have had family, social, or business relations, and the result is sometimes satisfactory.

It would be much better for the business man not to wait until trouble comes to select his lawyer, but to secure one in advance who is competent, trustworthy, and conscientious, and to arrange to have him as a regular adviser. An intelligent lawyer is usually a good business man, and frequent consulta-

tions with the right kind of lawyer will prove of no small advantage.

If it is possible, a man may well go to an older lawyer who for good reasons is unable to take the business himself, and ask him to recommend some lawyer who could be retained as permanent counsel, giving him some idea of what the requirements would be. A judge has an excellent opportunity to know the lawyers who practice before him and to ascertain their qualifications and degree of ethical advancement. Every lawyer has professional friends and associates who are straightforward and whom he would trust with his own business. A business man of experience could also recommend some lawyers whom he knew to be reliable. It is a great mistake to minimize the difficulties in the way of making a wise selection of a lawyer.

Ordinarily the selection of a lawyer need not be hurried. If suit is to be brought, usually a period of years must elapse before the claim is outlawed, and, unless there is some other condition that calls for prompt action, all the time needed may be taken for the selection of an attorney. When, however, one is made defendant in a suit, he should get in touch with his lawyer without delay as there is usually much for the attorney to do in preparing the case, and, as a rule, some action is necessary within twenty days from service of notice.

It should always be remembered that a lawyer should be employed, not to conduct litigation but to avoid litigation. Litigation, generally speaking, is like war, a destructive and unsatisfactory expedient. Two prominent New York lawyers express themselves as follows:

Jerome S. Secord says:

> When matters in dispute have actually arisen and the transaction has already taken place, care should be taken to select an attorney who has the reputation of keeping his clients out of litigation rather than getting them in, as I

firmly believe the attorneys can do more to prevent litigation than anyone else, and that should be their aim.

Ednor A. Marsh says:

I have spent over twenty-five years trying to keep my clients out of litigation and think I have attained some success in that regard. As a result of that experience, I believe there is only one effective method of bringing about this very desirable result. I have almost invariably found that if the other side was in the hands of a high-class lawyer we could, by honest effort, reach some ground upon which the matter could be settled.

§ 442. Lawyers' Compensation

In employing an attorney, it is best to be entirely frank with him. The contract which the client is about to make is for legal service for which he expects to pay. It is not possible to have an established market price for legal services as is the case with more material commodities. Some lawyers presume on this fact and charge extortionate fees. In the same city the fees of different practitioners may be as far apart as $100 and $1,000 for the same services. There may be this much difference in the value of the services secured but this is not always the case. When engaging an attorney, either as permanent counsel or for a single matter of business, it will save trouble and misunderstanding to ask him frankly what he means to charge.

Some services, such as incorporating a company, drafting a will, and the like, can be estimated positively and a definite price can be given. In other matters, as for the conduct of a case, it is not possible to state definitely in advance what the cost will be. Almost every lawyer has a certain time rate, however, and grades his prices on the amount of time that it requires. Usually, time spent in consultation or in the lawyer's office will have one price, and time spent in the trial or the argument of the case will be rated at a much higher price. If

a lawyer states what he charges for his time in preparing a case and what he will charge when on trial, it is possible to get some rough idea of what the proposed litigation is likely to cost.

A good plan is to arrange for a yearly consultation fee, which gives the privilege of consulting on any matters which come up. Then it should be understood that for actual legal work, negotiating, drawing contracts, or conducting litigation, regular prices are to be charged.

It is to be borne in mind that in this discussion of lawyers' compensation, the prices paid specialists or famous trial lawyers, or men who work for wealthy clients and wealthy corporations are not considered. Usually these charge all that the traffic will bear and sometimes more. Their services are luxuries which cannot be afforded by the average business man.

Part XVIII—Arbitration

CHAPTER LXXX

ARBITRATION AND LAW[1]

§ 443. Advantages of Arbitration

An action at law may be costly and most unsatisfactory; many times men who have the right clearly on their side will waive it all rather than go through the delay and the expense of litigation. Arbitration is an expedient used frequently, though not so often as it should be, to avoid litigation. The parties to a dispute may, at any time, agree to submit their differences to the decision of one or more disinterested persons. In many contracts it is now provided that any dispute or misunderstanding as to terms shall be thus settled by arbitration.

The great advantage of settling a dispute by arbitration is that there is no delay in securing a decision, and therefore the loss of time incident to a prolonged litigation is avoided. A further advantage is that it saves the heavy costs incident to most modern legal proceedings. Another advantage is that arbitrators are less likely to be hampered by the technicalities of legal procedure, and hence their decision may be nearer justice and common sense.

§ 444. Objections to Arbitration

Arbitration, like most other human institutions, is imperfect in its operations and results. The arbitrators are not in-

[1] For form of agreement to arbitrate, see Chapter XCI, Form 67.

fallible, and their decision, though honest and well-intentioned, may not be really right; or it may be just but contrary to the letter of the law, and in that case the party that has the law on his side will feel that in some way he has lost out. The arbitrators will have some sort of hearing before they decide, and the absence of the technical rules of a court will be found to have its disadvantages and to be in some respects unsatisfactory.

Whenever a dispute is settled, either by arbitration or by litigation, the losing party is naturally dissatisfied and in many cases the winning party is dissatisfied also. That is a manifestation of human nature which cannot of course be avoided by any system of settling disputes.

The most serious objection to arbitration is that the arbitrators cannot enforce their decision. That is, unless the losing party voluntarily submits to the award against him, the arbitrators cannot collect damages or compel obedience. If the losing party refuses to comply it is necessary to go into a court and to get its judgment to enforce the decision of the arbitrators.

§ 445. Statutory Arbitration

In recent years methods of arbitration have been established by law in many of the states. Where that is the case, the parties may either make their own agreement for arbitration or resort to the statutory method, as they choose. In the agreement they make for arbitration they must not violate the statutes; otherwise the parties are free to make whatever arrangement they prefer.

One advantage in arbitration under the statutes is that the award of the arbitrators is usually confirmed by the courts, as part of the procedure, and may be enforced just as any other court decision may be. It is not necessary to bring a suit; the court recognizes the arbitrator's decision.

§ 446. Arbitration by Agreement

Arbitration may be agreed to after the dispute has arisen, or it may be embodied in the original contract, and to come into play if any difficulty arises.

There are two ways in which arbitration is provided:

1. Two arbitrators are appointed by the parties and they select a third arbitrator and the three decide, or, rather, two of the three decide.

2. Two arbitrators are appointed by the parties, and if they cannot agree on a decision, they choose an umpire. In such a case the umpire would have to hear the entire matter, and his decision would prevail.

The agreement to arbitrate should specify clearly just what matters are to be submitted for decision, because arbitrators can decide only on matters that are actually submitted to them. The agreement will be given to the arbitrators, and their power to decide will be limited by what is specified therein. If they go beyond their powers and decide other matters, then decision will be enforced only so far as it relates to the points specified. The parties may, however, agree to accept the decision of the arbitrators on other points.

When the arbitrators have decided against one of the parties, in adjusting the amount due, the arbitrators will not necessarily be limited by the agreement to arbitrate; they have the power to settle on such amount as they find to be just. It should also be provided that the award of the arbitrators may be enforced by any court as a judgment.

§ 447. Withdrawal from Arbitration

The parties making contracts are not allowed to stipulate that they will not go into court. Neither party can be barred from his right to litigate; such a provision would be contrary to public policy and could not be enforced. Therefore, either party may withdraw from the arbitration, and commence a

suit in court at any time before the arbitrators have reached their final decision, unless the law of the particular state forbids it.

If one of the arbitrators named dies before the final decision is reached, that ends the proceeding. New arbitrators must be appointed, if the parties still desire to arbitrate. If one of the parties dies while the arbitration is pending, the continuance of the arbitration depends on whether the law would allow his executors or administrators to go on with a suit over the same controversy.

§ 448. Hearings

The arbitrators must give all the parties reasonable notice of hearings, but if a party has been properly notified and fails to attend a hearing, he need not be notified of the time to which it has been adjourned. Any award made without giving notice may be set aside. All the arbitrators must be present at each hearing. As a matter of course, each party is entitled to present his case. If this is not allowed, it makes the arbitration void and of no effect.

§ 449. Setting Aside the Award

After the final decision has been fairly made, it may be set aside only by the agreement of the parties. If, however, the award was not fairly reached, but was influenced by fraud or falsehood, then either party to the arbitration may appeal to a court to have it set aside.

The arbitrators are required to use their own judgment in reaching a decision. They may not submit the case to someone else for decision. If they disagree as to the amount to be paid by the losing party, they must not settle the dispute by adding together the estimates of the different arbitrators and then dividing it by the number of arbitrators.

If they do either of these things, either party may have

the award set aside. The award must also be a final and complete settlement of all matters submitted to the arbitrators under the agreement. If they leave anything open for future controversy, the award may be set aside. The object of arbitration is to settle all disputes, hence it should be comprehensive and conclusive.

§ 450. Signing the Award

If the statute or the agreement under which the arbitration proceedings are conducted provides that the award must be in writing, the document must be written out and signed by all the arbitrators. A provision to this effect should be included in every arbitration agreement. This is for convenience of proof in case such evidence is needed.

§ 451. Enforcing the Award

It should be provided in the agreement that the award of the arbitrators may be entered as a judgment of the court; otherwise the arbitrators have no way of enforcing their decision. For instance, if the arbitrators decided that one of the parties was to pay the other $5,000, they could not enforce it by execution, as a court does. On this account it would be necessary for the party to whom the money had been awarded to get the help of the court in enforcing the decision of the arbitrators. Such a suit, however, would be a very simple matter. A court would not go into the merits of the controversy; the only question before the court would be: "Was the award legally made?"

Notes:

1. Arbitration is better than litigation but not as good as a friendly settlement. "Agree with thine adversary quickly, whiles thou art in the way with him." *St. Matthew V, 25.*

§ 452. Agreement for Arbitration

In drawing up an agreement of arbitration the parties should go much more into detail than is usually the case. The agreement requires a careful analysis of the controversy and should provide for the following particulars:

1. For the appointment of arbitrators. (The usual method is to allow each party to choose one, and to let the two choose a third.)

2. For giving a full, clear, and orderly statement of the definite questions which are to be submitted to the arbitrators.

3. That two of the arbitrators may decide the matter. Otherwise all must agree.

4. For the payment of the expenses of the arbitration. The arbitrators may be allowed to assess this if the parties wish.

5. That the decision or the award should be in writing, and signed by the arbitrators as well.

6. That the award of the arbitrators may be enforced as a judgment by any court of record.

7. The signing and the acknowledgment of the agreement before a notary public, so that it may be entitled to be filed in court in the same way as a judgment.

If one of the parties is a partnership, all of the partners must sign, or there must be a written consent to the agreement by those who do not sign filed with it. If one of the parties is a corporation, there must be a resolution of the board of directors authorizing the submission to arbitration, and a certified copy of the resolution must be filed with the agreement.

Notes:

1. Parties should make sure that all details are provided for in the agreement to arbitrate.

Part XIX—Forms

CHAPTER LXXXI

CONTRACT FORMS

The forms that follow cannot be comprehensive but are intended to be suggestive. When a person who has had no legal training attempts to write a contract, he will do well to avoid legal language and to express himself in plain, straightforward English such as he is accustomed to use in business. Attempts to use technical phrases usually result in obscurity and prolixity. It should be said further that where the subject matter is important or valuable, professional assistance should be secured.

Form 1. Simple Contract

AGREEMENT

This agreement is made this 22nd day of January, 1918, between William Morgan and John Robertson, both of Albion, Indiana.

William Morgan undertakes to construct a line fence between his pasture and the pasture of John Robertson. The fence is to be about forty rods long, made of barbed wire, six wires high, fastened on black locust posts set firmly in the ground every eight feet.

When the fence is completed John Robertson is to pay to William Morgan one-half of the cost of the materials and labor plus ten per cent. In addition, William Morgan is to receive the material from the old fence now between the pastures.

WILLIAM MORGAN
JOHN ROBERTSON

The foregoing agreement has the elements of a contract arranged in separate paragraphs: (1) competent parties, (2) something to be done, (3) the consideration.

Form 2. Contract by Letter

Trenton, New Jersey,
January 17, 1918.

Trustees of Trenton Choral Society,
211 Greensward Street,
Trenton, New Jersey.

Gentlemen:—

In answer to your inquiry, we can let you have the use of the Main Hall in our building, 484 Main Street, for two nights, February 21 and 22, 1918, for the concerts of your Society, including light and heat, for seventy-five dollars a night, or one hundred and fifty dollars for the two nights. It is understood that this contract is with you three gentlemen personally and that you individually agree to pay the specified rent.

Yours very truly,
Hayes & Marcus

Messrs. Hayes & Marcus,
484 Main Street,
Trenton, New Jersey.

Trenton, N. J.
January 19, 1918.

Gentlemen:—

In reply to your letter of the 17th, would say that your proposition is accepted and we shall arrange for the concerts February 21 and 22 as specified.

We bind ourselves individually to pay the price named, one hundred and fifty dollars, for the two nights.

Respectfully,
H. J. Thomas
John E. Baker
Alfred Dickson

Form 3. Unilateral Contract

Agreement

In consideration of the sum of Seventy-Five ($75) Dollars to me in hand paid by Henry Adams, the receipt whereof is hereby acknowledged, I agree and bind myself to remove all signs projecting more than six inches from the front of the building, No. 241 Summit Street, Akron, Ohio, occupied by me as a hardware store, and I will not place nor allow to be placed any sign or other projection extending more than six inches from the front of the said building during the term of my lease which expires three years from January 1, 1918.

Akron, Ohio,
Feb. 11, 1918.

Arthur Allen

The foregoing contract is a unilateral contract and is signed by but one of the parties, the other party having

executed his part of it—the payment of the consideration. It fulfills the requirements of the Statute of Frauds, being a memorandum signed by the party to be charged with responsibility in the matter.

Form 4. Formal Contract

AGREEMENT

This agreement entered into this 26th day of January, 1918, between Charles Davenport of Lexington, Kentucky, and George Atkins of the same place, sets forth that the said parties have entered into the following contract:

1. Charles Davenport agrees and binds himself to take the superintendency of the stock farm of the said George Atkins known as Highland Park and situated ten miles northeast of Lexington, and to give his entire time to his duties as such superintendent.

2. His duties will require that he reside on the said premises and he is to have the use of the house on the Midland Road in the northwest part of said property for himself and family, together with the garden ground immediately surrounding it and the use of the outbuildings thereto attached.

(*Other numbered sections will set forth his duties and obligations as fully as may be desired.*)

11. In consideration of the foregoing undertakings of the said Charles Davenport, the said George Atkins agrees and binds himself to pay to the said Charles Davenport the sum of Twenty-Four Hundred Dollars ($2400) per annum, to be paid in monthly instalments of Two Hundred Dollars ($200) on the last day of each month, and in addition thereto a commission of ten per cent on the price of all live stock sold from the premises during the period of this agreement and for one year thereafter.

12. This agreement shall begin March 1, 1918, and shall continue for three years from that date and thereafter from year to year until either party terminates the agreement by giving the other party notice of his desire to terminate the agreement, six months before the next March.

In witness of this agreement the said parties have hereunto affixed their signatures this 26th day of January, 1918.

CHARLES DAVENPORT
GEORGE ATKINS

Form 5. Corporate Contract

CONTRACT

An agreement made and entered into this 6th day of February, A.D. 1918, by and between the Warren Lithographing Company, a corporation under the laws of the State of Maine doing business in Worcester, Mass., party of the first part, and the Houston Lithographing Company, a cor-

poration under the laws of the State of New York having its principal office at No. 20 Broad Street, New York City, party of the second part.

For and in consideration of the sum of One Dollar and of other valuable considerations passing between the parties hereto, the receipt whereof is hereby respectively acknowledged, it is agreed as follows:

1. That the said party of the first part shall employ one John Putnam of Hartford, Connecticut, for account of both the parties hereunto, to work upon and perfect as far as may be, a certain improvement in lithography known as the "Copper Plate Process," said process being now the joint property of the said parties to this present agreement.

2. That said party of the first part shall pay the said John Putnam a monthly salary not exceeding Three Hundred Dollars ($300) and shall also furnish such materials, supplies, and assistance as the said John Putnam may reasonably require in the process of his work.

3. That at the end of each quarter said party of the first part shall render a statement of the expenses incurred by reason of the employment of the said John Putnam for the perfection of the said Copper Plate Process, and said party of the second part shall within ten days of the receipt of said statement remit one-half thereof to the said party of the first part.

4. That all improvements in said Copper Plate Process or in connection therewith that may be made or discovered by the said John Putnam, shall be the joint and equal property of the two parties to this present agreement, and patents therefor shall be taken out in the names of the said parties of this present agreement and at their joint expense.

5. That said employment of said John Putnam shall continue for one year from date, unless sooner terminated by mutual agreement or by circumstances beyond the control of the parties hereto.

(Testimonium and signatures as in Form 56.)

.....

Form 6. Assignment of Contract

.....

ASSIGNMENT

KNOW ALL MEN BY THESE PRESENTS:

That for and in consideration of the payment by the Connecticut Valley Paper Mills, a corporation organized under the laws of the State of Connecticut and having its principal office and place of business at 525 Main Street, New Haven, Connecticut, of Twenty-five Thousand, Seven Hundred and Forty-five Dollars ($25,745) to James Holden, having his office and place of business at 152 Warren Street, New York City, the receipt of which payment is by the said Holden hereby acknowledged, said James Holden does hereby assign, transfer, and convey to the said Connecticut Valley Paper Mills, all and singular, his right, title, and interest of every kind in and to a certain contract (copy of which is hereunto annexed and made part of this present instrument) entered into on the 31st day of July, 1917, between Martin S. Coleman of Brooklyn, New York, and said James Holden, said contract vesting in said Holden, his representatives and assigns, under the conditions in said contract, the exclusive right to acquire and use all the inventions and processes that may hereafter be made, discovered, or devised by the said Coleman for the manufacture of paper or to be used in connection therewith, said contract being conveyed to and accepted by the said Connecticut Valley Paper Mills

with all its rights, privileges, and obligations as herein set forth and as hereunto held by the said James Holden.

IN WITNESS WHEREOF, the said James Holden has hereunto affixed his signature and seal, in the City, County, and State of New York, on this 28th day of October, 1917.

Attest: JAMES HOLDEN. [L.S.]
MARY WILFORD.

.....

Acknowledgment is not essential to this assignment but is advisable.

The assignment of contract which follows is informal but sufficient where the whole transaction is well understood. In practice it is usually indorsed on the back of the contract to be assigned, or, with the word "within" changed to "above and foregoing," is placed on the last page of the contract.

Form 7. Assignment of Contract—Indorsement Form

.....

For and in consideration of One Dollar and of other sufficient considerations, the receipt of all which is hereby acknowledged, the Sterling Power Company does hereby sell, assign, and transfer to Howard Graham the within contract with all the rights, privileges, obligations, and undertakings thereof as therein set forth

IN WITNESS WHEREOF, the signature and the attested seal of the said Sterling Power Company are hereunto affixed by its duly authorized officers this 16th day of November, 1917.

{ CORPORATE SEAL } STERLING POWER COMPANY,
By MILLER STERLING,
President

Attest Seal:
HENRY WELLING,
Secretary

CHAPTER LXXXII

SALES CONTRACTS

Form 8. Memorandum of Sale

MEMORANDUM

THE KELLEY COMMISSION COMPANY,
159 La Salle Street, Chicago, Illinois

August 21, 1917

We have this day sold to John D. Heiden, Urbana, Illinois, payable sixty days after delivery, five per cent discount for cash, the following goods:

50 barrels of flour @ $12.50 per barrel,
delivery to be made within ten days, f.o.b.
Chicago.

THE KELLEY COMMISSION COMPANY,
By HENRY TOMPKINS,
Treasurer

JOHN D. HEIDEN

The above memorandum is sufficient under the Statute of Frauds to make a binding contract, and it will be noted it is signed by both parties. If only one party signed, he alone could be held.

Form 9. Contract of Sale By Letter

OFFER

MOUNT HOLLEY IRON COMPANY,
Ashfield, N. J.

January 10, 1918.

MR. RICHARD A. PERRY,
365 Amity Street,
Newark, N. J.

DEAR SIR:—

Our company has on hand some thirty or forty tons of nut and bolt scraps which we shall be pleased to sell at $1.30 per hundredweight, terms

30 days, and deliver in Newark within five days after order. We will sell in lots of not less than ten tons.

Kindly advise at earliest convenience if you desire any or all of this material.

Yours very truly,
MOUNT HOLLEY IRON COMPANY,
By J. SHELDON,
Secretary

ACCEPTANCE

Newark, January 12, 1918.

MOUNT HOLLEY IRON COMPANY,
Ashfield, N. J.

GENTLEMEN:—

In reply to your letter of January 10, I shall be pleased to take fifteen tons of the nut and bolt scraps you describe, at price and on terms named, provided same is delivered on or before the 18th of this month.

Yours very truly,
RICHARD A. PERRY

Form 10. Conditional Sales Contract

LEASE AGREEMENT

This agreement certifies that Harry D. McKay, the undersigned, now living at 136 Park Place, New Rochelle, New York, has received from the W. H. Cary Manufacturing Company, a corporation under the laws of New York, one second-hand Dodge automobile, returnable on demand, in good order and repair, and valued at Five Hundred and Forty Dollars ($540). This the undersigned agrees to use with care and keep in good order and condition, and he agrees to pay for the use of it as follows:

On delivery of said property, One Hundred Dollars ($100), which shall be accepted as payment for rent until March 1, 1918, and then he shall pay at the rate of Twenty-Five Dollars ($25) per month in advance on the first day of each and every month, without notice or demand, at the office of the said W. H. Cary Manufacturing Company, No. 485 Adams Street, Brooklyn, New York. If default be made in any of the payments so provided, or in case the undersigned shall sell, offer to sell, remove, or attempt to remove said property from under his custody or control without the consent in writing of the said W. H. Cary Manufacturing Company, then this lease shall cease and terminate, and the said W. H. Cary Manufacturing Company, or its agent, is authorized to take actual possession of said property wherever the same may be.

It is further agreed that the undersigned may at any time within said rental period purchase the said automobile by paying the named valuation therefor, and in that case the rent theretofore paid shall be deducted from the purchase price. If any instalment of rent is not paid when due, or if said property is not returned upon demand, the undersigned agrees to pay

an attorney's fee of Twenty-Five Dollars ($25) in case his lease is placed in the hands of an attorney for collection of said rent, or to recover possession of the said automobile.

HARRY D. McKAY

New Rochelle, New York,
January 10, 1918.

Attest:
HENRY SMITH

.....

The above is a form of a conditional contract used in the sale of goods on instalments. Signed by the vendee, it is good in New York and can be filed without acknowledgment or affidavit. If it were desired to make such a contract in any other state, it would be necessary to see what the state laws were in regard to conditional sales, and it would not be safe to proceed without such an investigation or the employment of a lawyer.

In any state one can apply to an instalment house or to an agent for automobiles, cash registers, pianos, safes, or other similar articles, and get a blank form that will meet local requirements.

Form 11. Guaranty Contract by Letter

.....

TODD & CO.,
Terre Haute, Indiana.

GENTLEMEN:—

For value received, and in consideration that you shall hereafter give credit to Thomas J. Allen from time to time in the course of his business as retail grocer in Terre Haute, Indiana, I, James S. Martin, do hereby undertake and guarantee the payment of any sums for which said Thomas J. Allen may become indebted to you, not to exceed the sum of Two Thousand Dollars ($2,000).

This instrument is intended as a general, unlimited, continuing guaranty, whereby I undertake and guarantee as a primary liability upon me, any and all balance of indebtedness due you from Thomas J. Allen or that may hereafter become due, and any contract entered into by Thomas J. Allen and Todd & Co., creating or extending such indebtedness, or changing the form thereof, shall be binding upon me, without notice, and render me liable under this guaranty.

JAMES S. MARTIN

Chicago, Illinois,
January 10, 1918.

Form 12. Guaranty Contract

GUARANTY

THE UNDERSIGNED, for and in consideration of one dollar in hand paid by George T. Larkins of Dallas, Texas, hereinafter called the Purchaser, the receipt whereof is hereby acknowledged, and the further consideration of enabling the said Purchaser to buy goods, wares, and merchandise on credit from Green & Company, Minneapolis, Minnesota, hereinafter called the Vendor, hereby jointly and severally guarantee the payment of, and bind ourselves personally, our heirs, executors, and administrators to said Vendor, for the payment of all debts of every kind, name, and nature, including interest which the said Purchaser is now owing, or may hereafter owe, the said Vendor, whether due or not due, provided, however, that the liability of the undersigned hereunder shall not be for a greater amount than Five Thousand Dollars ($5,000) and interest.

The undersigned agree that the debts, payment of which is hereby guaranteed, may, by note or otherwise, be changed in form, extended, or renewed at the option of said Vendor without notice to the undersigned, and the liability of the undersigned shall not be affected by such change, extension, or renewal; that this guaranty shall remain in full force and effect up to such date as the said Vendor shall have received at its office in Minneapolis, Minnesota, written notice from the undersigned to cease selling the said Purchaser on the strength of their guaranty; that the Vendor may at its option extend credit to the Purchaser to an amount in excess of the limit to this guaranty without impairing our joint and several liabilities hereunder; that should said Vendor commence suit against the Purchaser, or against the undersigned on this guaranty, to pay a reasonable attorney fee, and that the same may be taxed against the undersigned as part of the costs in said action.

The undersigned hereby waives notice from the Vendor of the amount of indebtedness, default in payment, or of the acceptance of this guaranty.

IN WITNESS WHEREOF, we have hereunto subscribed our names at St. Louis, Missouri, on this 1st day of February, A.D., 1918.

R. L. SANDERS
CHARLES D. BATES
LEE D. NORRIS

Witnesses:
HAROLD SMITH
JAMES B. DONNELLY

Form 13. Bill of Sale—Personal

BILL OF SALE

Be it known that Thomas Gray of Beaver Falls, Pennsylvania, in consideration of the sum of One Hundred and Seventy-Five Dollars ($175) paid by Allen Ruskin of Pittsburgh, Pennsylvania, the receipt whereof is hereby acknowledged, does hereby sell, transfer, and deliver unto the said Allen Ruskin the following goods and chattels, namely:

(*Itemized list of goods and chattels follows.*)

To have and to hold, all and singular, the said goods and chattels to the said Allen Ruskin, his representatives, and assigns to their use and behoof forever, and I hereby convenant that I am the lawful owner of the said goods and chattels, that they are unencumbered, that I have good right to sell the same, and that I will warrant and defend the title of the same against the claims and demands of all persons.

In Witness Whereof, I have hereunto set my hand and seal in Beaver Falls, Pennsylvania, this 30th day of January, 1918.

Thomas Gray [L.S.]

.....

Form 14. Bill of Sale—Personal

.....

Bill of Sale

In consideration of the sum of Eight Hundred Dollars ($800) cash, to me in hand paid by Emily Gates of New York City, New York (vendee herein), the receipt whereof is hereby acknowledged, I, Margaret Banning of New York City, New York (vendor herein), do hereby sell, assign, transfer, and convey to the said Emily Gates:

All and singular the household goods and furniture, bedding, carpets, rugs, pictures, books, china, glassware, and sundries contained in my residence, No. 232 West 86th Street, New York City, New York, the same being more particularly set out in the inventory hereunto attached and made part hereof:

To have and to hold the said goods and chattels to the sole use and behoof of the said Emily Gates, her heirs, assigns, and personal representatives, forever.

And I do hereby convenant with the said Emily Gates that I am the lawful owner of the said goods and chattels; that they are free from all liens; that I have good right to sell the same as aforesaid; and that I will warrant and defend the same against the lawful claims and demands of all persons.

In Witness Whereof, I have hereunto affixed my hand and seal, this 23rd day of July, 1917.

Margaret Banning [L.S.]

State of New York }
County of New York } *ss.*:

On this 23rd day of July, 1917, before me personally appeared Margaret Banning, to me known and known to me to be the person described in and who executed the foregoing bill of sale, and acknowledged to me that she executed the same for the uses and purposes therein set forth.

Oscar Wyatt,
Notary Public No. 380,
New York County, N. Y.

.....

The acknowledgment to the foregoing bill of sale is not essential but is often added.

Form 15. Contract of Warranty

THE BENEDICT WAGON COMPANY,
Columbus, Ohio

December 15, 1917.

MR. JOHN E. COURTNEY,
Mount Adams, Ohio.

DEAR SIR:

We have received your letter making inquiry as to our platform spring wagons shown on catalogue heretofore sent you.

Our No. 530 Standard is well made and has the best quality of wood and steel in every part. We will warrant it for one year to carry loads not in excess of four tons, anywhere on a country road, if drawn by two horses. We will warrant the springs and running gear against any flaw in material or workmanship for five years after purchase. The price is $250, and, if you desire, it can be paid half down and the balance by your note at one year.

May we ship you the wagon?

Very truly yours,
THE BENEDICT WAGON COMPANY

Mount Adams, Ohio,
December 17, 1917.

THE BENEDICT WAGON COMPANY,
Columbus, Ohio.

GENTLEMEN:—

In reply to your letter of December 15, would say that I shall be pleased to take the wagon on the terms and under your warranty as specified.

Very truly yours,
JOHN E. COURTNEY

CHAPTER LXXXIII

AGENCY FORMS

Form 16. Appointment of Special Agent

.....

APPOINTMENT OF AGENT

I, the undersigned, do hereby constitute and appoint Arthur C. McCall of Cincinnati, Ohio, my agent and representative, for me and in my place and stead to receive and receipt for any and all payments that may be payable to me from the estate of Howard Lansing, deceased, late of Hamilton County, State of Ohio, and authorize him to do all other things that may be necessary to carry into effect the intent of this appointment, and I hereby ratify and confirm all that my said agent may do in pursuance of the authority herein conferred.

IN WITNESS WHEREOF, I have hereunto affixed my signature and seal, in Brooklyn, New York, this 8th day of January, 1918.

JOHN H. MARTIN [L.S.]

.....

Form 17. Appointment of General Agent

.....

APPOINTMENT OF AGENT

KNOW ALL MEN BY THESE PRESENTS:—

That I, the undersigned, having enlisted in the service of the United States, and having to be absent during the term of such service, do hereby make, constitute, and appoint William F. Watkins of Newark, New Jersey, my general agent and attorney-in-fact, giving and granting unto him full power and authority to do and perform all things requisite and necessary to the management and care of my property and business, and in particular to the conduct of the coal and fuel business under the name of the Keystone Fuel Company, of which I am sole owner and proprietor, having its office at No. 421 Market Street, Newark, New Jersey, and its yards and storage rooms on the line of the Erie Railroad in the northern part of the said city of Newark. And I hereby give the said agent power to do and perform all things necessary to be done in the conduct of said business as fully and to all intents and purposes as I could myself do if personally present; and I do hereby authorize and empower him to sign as agent all letters, orders, bills, and receipts, necessary in the conduct of said business, and to indorse for collection and deposit all checks and bills of exchange in the name of the said company, and to draw checks on such deposits as agent, and I empower him to order coal and other fuel needed for the conduct of the said business up to but not exceeding Five Thousand Dollars ($5,000) at any one time, it being understood and agreed that any

orders in excess of that amount shall be sent to my lawyer, Henry Herbert, 124 Broad St., Newark, for his countersignature.

In Witness Whereof, I have hereunto set my hand and seal this twenty-eighth day of January in the year one thousand, nine hundred and eighteen.

Paul Penfield [L.S.]

Witness:
Harry Alford

.....

In connection with an agency such as this, there should be a carefully drawn contract, signed by both parties, setting forth in more detail the duties, obligations, and compensation of the agent. The appointment as agent is to be shown to those dealt with as evidence of the extent of his authority.

Form 18. Power of Attorney

.....

Power of Attorney

Know all men by these presents that I, Horace M. Maxwell of Cincinnati, Ohio, have made, constituted, and appointed, and by these presents do make, constitute, and appoint Julian Blanchard of New York City my true and lawful attorney for me and in my name, place, and stead to *(set out fully what is to be done by the attorney)*; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In Witness Whereof, I have hereunto set my hand and seal this eleventh day of July in the year one thousand, nine hundred and seventeen.

Horace M. Maxwell [L.S.]

Executed and delivered in the presence of:
Marion Colgate

.....

The foregoing is a simple form of power of attorney and can be used to empower another person to act and to do any business as an agent or representative of the principal who executes the power. If it were required that the attorney should execute a deed, or mortgage, or any other transaction involving land, or execute any instrument that would have to

be filed in a court or office of registry, it would be necessary that the principal should execute an acknowledgment before a notary public or other officer having a seal. The word "attorney" as used here does not mean an "attorney-at-law," but an "attorney-in-fact," or agent to transact business.

Form 19. Power of Attorney—Corporate

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS:—

That the Tucson Cattle Company, a corporation duly organized under the laws of Arizona, does hereby make, constitute, and appoint Howard H. McComb of the State of New York, its true and lawful attorney, for it and in its name, place, and stead, to collect and receive from the New York Drovers' Association of New York City the sum of Three Thousand Dollars ($3,000) with interest thereon at the legal rate from the 1st day of March, 1917, said amount being due and payable to the Tucson Cattle Company for and on account of cattle shipped the said New York Drovers' Association during the month of February, 1917, and the said Howard H. McComb is hereby fully authorized and empowered for and on account of the said Tucson Cattle Company and in its name, to collect, receive, and receipt for the said Three Thousand Dollars ($3,000), and the interest thereon as aforesaid, in whole or in part, but without prejudice to any portion thereof unpaid, and to incur and pay on behalf of the said Tucson Cattle Company all reasonable expenses incident to the collection of said amount, including all proper cost of any suit or other legal proceedings necessary thereto, and generally to do all such other things in connection therewith as may be necessary and proper in the premises.

IN WITNESS WHEREOF, the said Tucson Cattle Company has caused its corporate name to be signed hereunto by its President and its corporate seal to be affixed and attested by its Secretary, all being done in the City of Tucson, Arizona, on this the 25th day of January, 1918.

{ CORPORATE SEAL }

TUCSON CATTLE COMPANY,
By GEORGE M. PRICE,
President

Attest Seal:
WILSON M. BURNEY,
Secretary

The foregoing power of attorney would usually be acknowledged in order to give it greater weight and more ready recognition.

When a corporate power of attorney is given for some special act, it expires automatically as soon as that act is per-

formed. When, however, it is desired to terminate the powers prior thereto, or where the power is a continuing one, a formal revocation is necessary. Notice of this revocation should be sent to the parties directly interested, and, in case of a general power of attorney, should also be published.

Form 20. Revocation of Power of Attorney

REVOCATION OF POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS:—

That the Berwell Investment Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its office and principal place of business at No. 30 Broad Street in the City of New York, has for good cause and consideration revoked, recalled, annulled, and made void, and by these presents does revoke, recall, annul, and make void, a certain power of attorney given under date of August 18th, 1917, under its corporate signature and seal, to George B. Baldwin of Houston, Texas, and does hereby withdraw, deny, and cancel any and all powers and authorities whatsoever therein expressed and conveyed.

IN WITNESS WHEREOF, the said Berwell Investment Company has caused its corporate signature and seal to be hereunto affixed by its President and Secretary in the City of New York on this 19th day of January, 1918.

{ CORPORATE SEAL }

BERWELL INVESTMENT COMPANY,
By JAMES WARREN,
President
WILLIS BAKER,
Secretary

A simple form of proxy for stockholders' meetings, that can be readily altered for all ordinary purposes, is:

Form 21. Proxy—Simple Form

PROXY

I hereby appoint George H. Brewer my proxy, with full authority to vote for me and in my place at any and all stockholders' meetings of the Brewer Plow Company.

Witness my hand and seal this 8th day of October, 1917.

HAROLD J. MCCORMICK [L.S.]

Witnessed by
HENRY F. SIMMONS

This proxy is under most circumstances legally sufficient and the powers it conveys are broad. A more formal proxy is, however, desirable when important matters are to be considered. The proxy which follows is still simple as to form but more specific in its terms.

Form 22. Proxy—Unlimited

PROXY

I, the undersigned, do hereby constitute and appoint George J. McClelland my true and lawful attorney to represent me at any and all meetings of the stockholders of the Carney Falls Power Company, and for me and in my name and stead to vote thereat upon the stock standing in my name on the books of said Company at the times of said meetings, and I hereby grant my said attorney all the powers that I should myself possess if personally present thereat.

Witness my signature and seal this 1st day of August, 1917.

HAROLD B. MCCLELLAND [L.S.]

In the presence of
ALPHONSE H. DURET

Proxies for the first meeting of stockholders differ but little from proxies for other meetings, though they are usually limited to the particular meeting and its adjournments.

Directors cannot give proxies authorizing others to represent and vote for them at directors' meetings. The directors occupy a position of trust and they cannot as individuals delegate the trust vested in them to others.

When proxies are to be used they are filed with the secretary of the meeting. If the holder desires to retain his original proxy, he may, after exhibiting the original, file a certified copy with the secretary of the meeting.

Form 23. Revocation of Proxy

REVOCATION OF PROXY

KNOW ALL MEN BY THESE PRESENTS:

That I, the undersigned, do hereby revoke and annul any and all proxies or powers of attorney heretofore given by me, authorizing or

empowering any person or persons to represent me, or vote in my name and stead or act for me in any way whatsoever at any meeting or meetings of the stockholders of the Carney Falls Power Company.

Witness my signature and seal this 10th day of October, 1917.

DANIEL H. RONALDS [L.S.]

In the presence of
JOHN H. DUNN

.....

The foregoing revocation of outstanding proxies is sweeping in its terms. If some particular proxy is to be excepted from the general revocation, such proxy may be specifically reserved, or otherwise the revocation may itself be limited by its terms to the one or more proxies to be revoked, and any other proxies then outstanding are not affected.

CHAPTER LXXXIV

NEGOTIABLE INSTRUMENTS

Form 24. Check by Individual

MONTCLAIR, N. J., February 1, 1918 No. 1213

THE FIRST NATIONAL BANK
of Montclair, N. J.

Pay to the order of Union Congregational Church.....$25.00..
Twenty-five and 00/100.....Dollars

FRANK GRAY MELVILLE

A common form of corporate check follows.

The corporate seal is seldom if ever used on corporate checks, though its use does not affect the check in any way. When the corporate funds are material in amount, the names of two officials are usually required upon the check. Where the name of the company is placed elsewhere on the check, it may be omitted from the signature.

Form 25. Corporate Check

STANDARD COAL COMPANY

No. 1754 NEW YORK, August 1, 1917.

SEABOARD NATIONAL BANK
of the City of New York

Pay to the order of John H. Wilkins.....$425.75
Four Hundred Twenty-Five and 75/100.....Dollars

SAMUEL S. STEIGEL,
President
STEWART H. WILSON,
Treasurer

If the by-laws or a directors' resolution require that the corporate name be affixed by the treasurer and the check be countersigned by the president, as is frequently the case, the signatures would appear as follows:

Countersigned:
James J. McLane,
President

Merrivale Manufacturing Co.,
By Horace P. Wisner,
Treasurer

Form 26. Indorsement of Corporate Check

(1)

Vogel Shoe Company,
Ralph A. Smith,
Treasurer

(2)

Pay to the Order of the
Chase National Bank,
Howell Hardware Company,
John Blake, *Treasurer*

The ordinary indorsement of a check payable to a corporation is given in example (1) above. This indorsement is usually affixed by the treasurer or cashier, though the president is frequently authorized thereto.

The form of indorsement in example (2) above is usually affixed in its entirety—corporate name, official signature, etc.—with a rubber stamp. Such an indorsement is approved by the banks and, on account of the rapidity and convenience with which it may be affixed, is generally employed.

There are many forms of voucher checks, which differ according to the accounting system in use. This is a matter of modern accounting and will repay an investigation by anyone interested.

Form 27. (a) Voucher Check (face)

No. 5960 H. G. Waring Company
Dayton, Ohio, March 19, 1917.

Pay to the order of W. G. Holden & Co.....$220 00/100
Two Hundred Twenty and 00/100.....Dollars.
In full payment of account as shown on the reverse side of this Voucher
To
Winters National Bank,
Cincinnati, Ohio.

H. G. Waring Company,
By Percy Macey,
Treasurer

Indorsement Here

Form 27. (b) Voucher Check—Statement (reverse)

Voucher Check

No. 1689.

H. G. Waring Company,
Dayton, Ohio.

Favor of W. G. Holden & Co.
Address, Hamilton, Ohio.

Feb. 6	1 Fire-proof Safe, No. 2B.	220	00		

Audited and Approved,
E. E. A.

If not correct return without alteration or changes.

Form 28. Note by Individual

.....

$1,500.00 MONTCLAIR, N. J., March 1, 1918.

Ninety days.....after date I promise to pay to the order of Kendrick & Ames.....
Fifteen Hundred and 00/100.....Dollars
at their office, 20 Market St., Newark, N. J.
Value received

No. 315, Due May 30, 1918. HAROLD A. WILSON

.....

A corporate note is not required to be sealed. It may be signed by any officer or officers properly authorized thereto. Such authority is usually conferred by by-law provisions or by resolution of the board of directors, but otherwise may be given by custom. For large amounts or special transactions outside the usual routine, the officer's authorization should always be specific and usually by resolution of the board of directors.

The signature of a corporate note should always be the corporate signature. Any other signature may not only fail to bind the corporation, but has been held in some states to involve the official signing the note in a personal liability as its maker or indorser.

Form 29. Corporate Note—By President

.....

$500.00 NEW YORK, October 1, 1917.

Ninety days after date the Delcock Dredging Company promises to pay to the order of Howard P. Hunt the sum of Five Hundred Dollars.
Value Received.

DELCOCK DREDGING COMPANY,
By NATHANIEL POTTER,
President

Payable at
SEABOARD NATIONAL BANK,
New York
No. 589

Form 30. Corporate Note—By Treasurer

$2,500.00 BOSTON, MASS., September 1, 1917.

Four months after date the Hanover Securities Company promises to pay to the order of James C. Bennett the sum of Twenty-Five Hundred Dollars, with interest from date until paid, at the rate of Six Per Cent per annum, at the Sedgwick National Bank of Boston.

Value Received.

HANOVER SECURITIES COMPANY,
By WILLIAM CURTIS
Treasurer

No. 725.
Due January 1, 1918.

The preceding notes are in the simplest form. The corporate signature is affixed by one officer or by two, as may be customary or required by by-law provision or directed by the board.

Form 31. Corporate Note—Collateral Security

COLLATERAL NOTE

$10,000.00 NEW YORK, October 1, 1917.

Ninety days after date the Berwick Mercantile Company promises to pay to the order of the Guaranty Trust Company of New York City, at No. 140 Broadway, New York City, the sum of Ten Thousand Dollars, with interest from date until paid at the rate of Five Per Cent (5%) per annum, and the said Berwick Mercantile Company doth herewith deposit with the Guaranty Trust Company as collateral security for the due payment of the foregoing promissory note, Two Hundred (200) Shares of its stock in one Certificate No. 325, said Certificate standing in the name of Mark Baldwin, Treasurer of the said Berwick Mercantile Company, and indorsed by him in blank.

And in the event that this note or the interest thereon shall not be paid when due, the said Berwick Mercantile Company hereby appoints and constitutes the said Guaranty Trust Company its attorney in fact and irrevocably, with power of substitution, to sell at any time after this said note or any interest thereon is due and unpaid, with or without notice, and either at public or private sale, the whole or any part of said securities, the proceeds thereof to be applied to the payment of the said promissory note, any interest due thereon, and any commissions properly payable on the sales of said securities so sold, and any surplus remaining thereafter, either of cash or of the said securities to belong to and be subject to the order of the said Berwick Mercantile Company; and should said securities not bring the full amount of this present note, together with any interest accrued thereon, said Berwick Mercantile Company undertakes and agrees to pay the amount still due to the holder hereof on demand.

Should any such sale be made, the holder hereof shall directly or in the name of any other person, have the right to purchase the security aforesaid. In case the market value of the same shall decrease, the said Berwick Mercantile Company hereby promises and agrees to reduce proportionately the amount of its indebtedness hereunder, or otherwise increase the security in proportion to said decrease of value.

In Witness Whereof, the said Berwick Mercantile Company has caused its name to be subscribed hereunto by its President, and its duly attested seal to be affixed hereto by its Secretary, on the day and year first above written.

{ corporate seal } Berwick Mercantile Company,
By Henry S. Corbin,
President

Attest Seal:
Amos C. Hallock,
Secretary

.....

When the corporate officials are not expressly authorized to execute notes by due resolution deposited with the bank in whose favor the notes are drawn, a certified resolution evidencing their authority is usually required.

Form 32. Sight Draft

.....

No. 745 Baltimore, Md., January 7, 1918.

At sight.....pay to the order of
C. A. Wheeler.....$225.00
Two Hundred Twenty-Five and 00/100.....Dollars
Value received, and charge same to account of
Wilson & Stewart
To Union National Bank,
St. Louis, Mo.

.....

Acceptances

In business parlance, an acceptance is a draft or bill of exchange which has been accepted by writing the word "Accepted," and the place, date, and signature of the acceptor in red ink, across the face of the draft. Having been accepted in this way, it can circulate in the same manner as a promissory

note or any other form of negotiable paper. It is the intention of the Federal Reserve Board to increase very largely the use of these forms of credit. The business advantages of this are very great but cannot be discussed here.

There are two kinds of acceptances, bank acceptances and trade acceptances.

Bank Acceptances

Under the rules of the Federal Reserve Board, a bank acceptance is defined as follows: "A bill of exchange of which the acceptor is a bank or trust company, or a firm, person, company or corporation engaged in the business of granting bankers' acceptance credits."

Form 33 is an example of this form of acceptance. When the bank accepts it by writing across the face in red ink its acceptance, it has really loaned its credit to the parties who have drawn upon it. The acceptance can then be disposed of either through the Federal Reserve Banks or to bankers or brokers dealing in acceptances. The use of these bank acceptances will probably be much extended and they will undoubtedly bear an important part, especially in the field of foreign commerce.

Form 33. Bank Acceptance

.....

$330.00 Denver, Colo., January 24, 1918.

At ninety days after sight.....pay to the order of C. A. Wheeler.....

Three Hundred Thirty and 00/100.....Dollars

Value received, and charge same to account of

A. B. Tranning

To Commercial Exchange Bank,
New York, N. Y.

No. 678

The word "Accepted" with date and signature, and memorandum of when due, will be written in red ink across the face of the above draft when presented for acceptance at the Commercial Exchange Bank. The difference between this and the sight draft above is that this draft is paid ninety days after sight and should therefore be accepted by the drawee.

Trade Acceptances

Form 34 is what is called a trade acceptance. In this country most of the credit business has been done on the open-account system whereby goods are sold at thirty, sixty, or ninety days, or in many cases without any definite time of payment. This system has many disadvantages. First, it compels the seller to carry the financial burden of the buyer and so ties up his capital for an indefinite period. Also, the expense involved in collecting slow accounts and granting extensions constitutes in the aggregate a heavy tax on business. All these disadvantages are eliminated by the use of the trade acceptance.

When a wholesale merchant has sold goods to a retail merchant, he may draw on him forthwith, as shown in Form 34a, for the amount of the invoice at thirty, sixty, or ninety days according to the terms of credit. The buyer should write his acceptance as shown in Form 34b, sign his name, and return the draft to the seller. Then the seller has in effect a piece of negotiable paper for the amount of the goods sold, which, if his credit and the credit of the acceptor is good, can be discounted at any Federal Reserve Bank. As a trade acceptance it becomes something that can be passed from hand to hand and bank to bank. Its use will enable credit to be granted in many cases where it could not otherwise have been granted and, for this reason, will tend to increase business.

Form 34. (a) Trade Acceptance

No. 286 NEW YORK, December 8, 1917.
At ninety days after sight.....pay to the order of ourselves $374.00
Three Hundred Seventy-Four and 00/100.....Dollars
Value received, and charge the same to account of
HENDERSON & MCKENZIE

To JAMES GRAHAM & SON,
Cleveland, Ohio

Form 34. (b) Trade Acceptance—Indorsement

Accepted
Cleveland, Ohio, December 11, 1917
Due March 4, 1918
JAMES GRAHAM & SON

In Europe where these trade acceptances have been in use for many years and have reached a high development as instruments of credit, it has always been the rule that they are to be issued solely for commercial purposes and against actual business transactions. Under the regulations of the Federal Reserve Board, the trade acceptance is defined as "a bill of exchange drawn by the seller on the purchaser of goods sold and accepted by such purchaser." In order to be discounted by the Federal Reserve Banks, these are the rules under which acceptances must be made:

> To be eligible for purchase, the bill must have arisen out of an actual commercial transaction, domestic or foreign; that is, it must be a bill which has been issued or drawn for agricultural, industrial or commercial purposes, or the proceeds of which have been used, or are to be used for the purpose of producing, purchasing, carrying or marketing goods in one or more of the steps of production, manufacture or distribution.

The word "goods" has been construed to include goods, wares, merchandise, and all agricultural products including live stock.

Dollar Acceptances

In consequence of the trade shiftings incident to the great war, the importance of New York as a trade and financial center has vastly increased. In this connection, the great banking houses are making an effort to make general the use of our decimal money system as a medium of international exchange. This is called the use of "dollar acceptances."

Under the amendment of September 7, 1916, to the Federal Reserve Act, in addition to the power to accept bills involved in the exportation and importation of goods, Federal Reserve Banks may accept drafts or bills of exchange drawn upon them, having not more than three months to run, exclusive of days of grace, drawn under regulations to be prescribed by the Federal Reserve Board, by banks or bankers in foreign countries or dependencies or insular possessions of the United States, for the purpose of furnishing dollar exchange as required by the usages of trade in the respective countries, dependencies, or insular possessions. The object of the amendment is to furnish dollar acceptances for international trade.

The dollar acceptance is simply the extension of the trade and bankers' acceptances to the uses of commerce between nations. It is likely that in years to come New York will be as important financially and commercially as London, and, as the use of a decimal currency has much to recommend it, there is good reason to believe that the future will see dollar exchange more generally used than sterling exchange has been in the past. It is certain that every business man should understand clearly what is meant by "dollar acceptances," "dollar exchange," and "dollar credits," as the terms are used by bankers.

CHAPTER LXXXV

CONTRACTS OF EMPLOYMENT

Form 35. Contract of Employment—Simple Form

CONTRACT

It is agreed that James Robinson is employed by Mark & Warren, 536 Fulton St., Brooklyn, New York, as store salesman, his term to begin Monday, February 4, 1918, and his salary to be Eighteen Dollars ($18) per week. His duties are to act as salesman in the store of said firm and to do anything else required in the conduct of its business.

Brooklyn, N. Y.,
January 29, 1918.

MARK & WARREN
JAMES ROBINSON

Form 36. Contract of Employment

AGREEMENT

By this agreement made between Blake & Hardiman and Arthur Parkman, the said firm hire and employ Arthur Parkman to assist them as an accountant in their business in Cleveland, Ohio, beginning February 1, 1918, and they agree to pay him for his services the sum of One Hundred Dollars ($100) per month, payable at the end of each calendar month.

Arthur Parkman agrees and undertakes that he will devote his entire time and attention to the work during the period of his employment with the firm.

It is agreed between the parties hereto that either party may terminate this agreement by giving notice to the other party thirty days before the expiration of any month in which it is desired to terminate the arrangement.

The parties have hereunto signed their names in Cleveland, Ohio, January 16, 1918.

BLAKE & HARDIMAN
ARTHUR PARKMAN

The two preceding contracts are informal and are written in ordinary business English. Their purpose is to show how

simple a matter it is to put the essentials of a contract in a brief written memorandum.

Form 37. Contract of Employment by Letter

HOWARD DESK COMPANY
25 Stone St., New York

December 15, 1917.

MR. WILLIS H. WALTERS,
225 Broadway, New York.

DEAR SIR:—

I am instructed by the Board of Directors to tender you the position of Sales Manager of this Company at a salary of $1,800 per annum, payable in monthly instalments of $150 each, your employment and duties to begin in case of your acceptance, on the 1st day of January, 1918.

Your early action in the matter will greatly oblige,

Yours very truly,
SHERWIN F. HAMILTON,
Secretary

ACCEPTANCE

NEW YORK CITY,
December 17, 1917.

HOWARD DESK COMPANY,
25 Stone Street,
New York City

GENTLEMEN:—

Your letter of December 15, 1917, offering the position of Sales Manager at a salary of $1,800 per annum, is hereby accepted. I shall close up my present engagements and be ready to begin January 1, 1918.

Yours sincerely,
WILLIS H. WALTERS

Form 38. Contract of Employment with Share in Profits

This agreement made this 10th day of October, 1917, by the firm of Wilkins, Lewis & Co., of the City and State of New York, and Theodore L. Comstock, of Jersey City, New Jersey, Witnesseth:

1. The said Comstock is hereby employed by said firm for the term of one year from January 1, 1918, renewable thereafter on like terms at the pleasure of both parties hereto, as salesman and manager of its sales department, to which the said Comstock is to give his entire time and attention.

2. The said Comstock shall receive an annual salary of Fifteen

Hundred Dollars ($1,500) for said services, payable in twelve equal instalments, at the end of each month.

3. In addition to said annual salary, the said Comstock shall receive as compensation for his services, an amount equal to ten per centum of the net profits of the said business, to be due and payable within ten days after each semiannual inventory and statement of the firm.

4. The said Comstock shall have no authority in the business outside of the sales department; he shall have no interest in the firm capital and property; he shall have no interest in the profits save as a measure to his compensation; he shall have no right to an accounting and shall in no other respects than as herein set forth, have any connection with the firm or its business.

5. It is mutually agreed that if either party to this arrangement wishes to discontinue it at the expiration of its period, and not to renew it for the like period, such party shall give the other party formal written notice not less than thirty days before the expiration thereof; otherwise this agreement shall be held to be renewed for a like period upon the same terms and conditions.

Witness the hands and seals of the parties the day and year first above written.

WILKINS, LEWIS & CO. [L.S.]
THEODORE L. COMSTOCK [L.S.]

Attest both signatures:
JAMES E. HILL

CHAPTER LXXXVI

PARTNERSHIP FORMS

Form 39. Simple Articles of Partnership

PARTNERSHIP AGREEMENT

Edward T. Craven and Milton Noble, both of the City of Rochester, New York, hereby mutually agree to become partners under the firm name of "Craven & Noble," to conduct the trade and business of sign-painting in the said City for the period of two years from date.

The said Craven invests his stock of paints, brushes, and other material, estimated to be worth Two Hundred Dollars ($200), and the said Noble invests Two Hundred Dollars ($200) in cash.

Both partners shall give their entire time and shall share losses and gains equally.

All amounts earned or received by either partner for work, materials, or anything pertaining to the business, shall be deposited in the Guardian Trust Company of Rochester in the name of both partners, and shall be taken out as needed for expenses and supplies, only by check signed by both partners, and an equal amount shall be drawn each Monday morning for each partner for personal expenses, but a balance of Two Hundred Dollars ($200) shall always be kept and held.

When the firm shall be dissolved, the material on hand shall be divided equally and all debts shall be paid from the money in bank, after which the balance shall be divided equally between the partners.

Witness our hands and seals this 13th day of October, 1917.

EDWARD T. CRAVEN [L.S.]

Attest: MILTON NOBLE [L.S.]

MARK GORHAM

An acknowledgment is not legally necessary to a partnership agreement though it is frequently appended.

Form 40. Articles of Copartnership

ARTICLES OF COPARTNERSHIP

These Articles of Copartnership entered into on this 20th day of October, 1917, by and between Edgar H. Bedell, of the City of New York, and John A. Sutton, of the City of Hartford, Connecticut, WITNESSETH:

1. The firm name of said copartnership shall be

"E. H. BEDELL & Co."

2. The offices and place of business of said firm shall be situated in the City, County, and State of New York.

3. The purpose of said firm shall be to conduct the business of buying and selling chocolate, cocoa, and their products and preparations.

4. The capital of said firm shall be the sum of Twelve Thousand Dollars ($12,000), of which the said Edgar H. Bedell shall invest the sum of Four Thousand Dollars ($4,000) and the said John A. Sutton shall invest the sum of Eight Thousand Dollars ($8,000).

5. The said Bedell shall give his entire time and attention to the said business and shall engage in no other business, undertaking, or speculation during the continuance of this agreement.

The said Sutton shall give such part of his time and attention to said business as may be necessary, but shall not be required to give up his present business interests.

6. This agreement shall bind the parties hereto until the first day of January, 1921, at which time it shall terminate unless expressly continued by written agreement for a further period.

7. Neither partner may withdraw from the business an amount in excess of Two Hundred Dollars ($200) per month, and all amounts so withdrawn shall be charged against the individual account of the partner withdrawing the same.

8. All moneys of the firm shall be deposited in a convenient bank in the City of New York, subject to withdrawal only by the check of the firm, signed with the firm name by the said Edgar H. Bedell, who shall have sole charge of the finances of the firm.

9. Books of account shall be kept, and at the end of the year a statement shall be made showing the net profits for the year, and such profits shall be divided between the said partners as follows: 40 per cent of said profits to the said Bedell and 60 per cent of the said profits to the said Sutton.

10. In the event of dissolution on account of death, expiration of the term, or other cause, the parties hereto bind themselves that the partnership affairs shall be settled under the direction and according to the statements of some reputable certified public accountant of the City of Hartford.

In Witness Whereof, the parties hereto have affixed their signatures and seals the day and year above mentioned.

Edgar H. Bedell [L.S.]
John A. Sutton [L.S.]

Attest:
Morris Kenwood

Form 41. Sundry Partnership Clauses

1. Participation in Business

(a) Neither partner shall during the continuance of this partnership be concerned in any other business unless with the written consent of the other party hereto.

(b) It is understood and agreed that each partner shall devote his whole time to the business of this partnership, and shall, during its continuance, engage in no other business, nor accept any office or trust that may interfere with his attendance at its place of business.

(c) The said Marvin shall give his entire time and attention to the

said business, and shall engage in no other business, undertaking, or speculation during its continuance.

(d) The said Wilson shall give to the said business such time and attention as may be necessary, but shall be at liberty to continue his present business of fire and marine insurance and to give it proper attention.

2. Secret and Silent Partners

(a) And it is agreed between the parties hereto that the said Bowen shall take no part in the management of the business, and that he shall not be held out as a partner, nor shall his connection with the said copartnership be known or announced.

(b) It is further agreed that the said Andrews shall allow the use of his name in the firm title and shall be entitled to share in the profits and shall be responsible for any losses incurred in the conduct of the firm business, but he shall take no part in the management thereof, and shall not interfere in the conduct of the firm business.

3. Against Indorsement or Assumption of Liability

(a) No note, bill, draft, check, or other obligation of the firm in excess of fifty dollars shall be signed or indorsed or accepted by either partner without consultation with and consent of the other partner thereto.

(b) Neither partner alone shall bind the firm to any contract or obligation involving a liability in excess of Five Hundred Dollars ($500), but every such contract or obligation shall require the signature of the firm name executed by both partners.

(c) During the continuance of this partnership, neither partner shall become surety or indorser, or otherwise make himself liable for the debt, default, or miscarriage of another.

(d) During the continuance of this partnership, no partner shall sign, indorse, or guarantee the payment of any commercial paper or other instrument, or make himself responsible for the debt, default, or miscarriage of any other person, firm, or corporation, unless with the written consent of the other partners hereto.

4. Against Speculation

(a) Neither partner shall engage, outside of the firm business, in any venture, speculation, or business operation of any kind involving possible gain or loss.

(b) During the continuance of this partnership, neither partner shall, either for himself or for the firm, engage in any sale, purchase, or other operation, either directly or indirectly, in or concerning stock, bonds, securities, or commodities other than those pertaining to the firm business herein set forth.

5. Accounting Clauses

(a) A full and correct record of the firm business shall be kept and each partner shall at all times have access to the books and records of the firm.

(b) The accounts of the firm shall be kept by double-entry bookkeeping and shall be balanced at the end of each month, and the books and records shall at all times be kept in the office of the firm and shall be open to the inspection of the partners. Each partner shall furnish the bookkeeper with a full record of all his transactions on behalf of the firm.

(c) An accounting shall be had at the close of each month, and the profits or losses shown shall be apportioned and paid to each partner as herein elsewhere provided.

(d) At or as near as may be to the first day of January in each year an inventory shall be taken, the books shall be closed, and a balance sheet prepared, showing the assets and liabilities, and the losses and gains for the preceding year. Any gain shown shall be apportioned as herein elsewhere directed, and shall be credited to the accounts of the partners entitled thereto.

(e) On or about the 30th day of June and the 31st day of December in each year, an inventory shall be taken, 10 per cent discount being allowed for depreciation of plant and stock and material on hand, and such amount being deducted from bills and accounts payable as shall be agreed upon by all the partners. Then the books shall be closed and a balance sheet prepared. After deducting all rents, salaries, wages, commissions, and expenses of conducting the business, including salaries as elsewhere provided herein for the partners, the net surplus profits shall be equally divided among the partners, and a copy of the balance sheet showing such closing and apportionment shall be given to each partner who shall be concluded thereby, unless he makes written objection thereto within thirty days after the receipt thereof.

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6. Employment of Assistants

(a) No clerk or other employee shall be engaged or discharged save by the agreement of both partners, and no salary or wages paid to any employee shall be increased save by the agreement of both partners.

(b) No person shall be employed in the firm business by any partner without consultation with and agreement thereto of all the members of the firm, and no person employed by the firm shall receive any increase of wages without the agreement of all members of the firm, and no employee shall be discharged without the agreement of all members of the firm except in case of gross misconduct or insolence.

CHAPTER LXXXVII

CORPORATE ORGANIZATION FORMS[1]

Form 42. Subscription List

SUBSCRIPTION LIST
PARKMAN METAL WORKING COMPANY

To be Incorporated under the Laws of New Jersey

Capital Stock.....$500,000
Shares.....$100 each

We, the undersigned, hereby severally subscribe at the par value thereof for the number of shares of the Capital Stock of the Parkman Metal Working Company set opposite our respective names, and agree to pay for the same in cash on demand of its Treasurer so soon as said Company is organized.

New York City, October 1, 1917.

NAMES	ADDRESSES	SHARES	AMOUNT
Harry H. Burton	20 Broad St., New York	20	$2,000
William McClellan	36 West 23rd St., New York	10	1,000

This subscription list is informal but will be found sufficient where the purposes and conditions of the subscription are well understood. It is to be noted that subscriptions under it—as is true of most of the usual forms of subscription agreements—are not binding until the company has been incorporated. Prior thereto they are merely continuing propositions to a corporation which is not yet organized and is therefore incapable of becoming a party to a contract. Hence until incorporation such subscriptions may be revoked at the will of the subscribers.

[1] For additional corporate forms, see Forms 5, 19-23, 25-27, 29-31.

Form 43. Stock Certificate—Common Stock

Certificate No. 125
For 20 shares.
Issued to
Howard H. McNeil,
35 William St.,
New York.
Dated, September 10, 1917.
From Whom Transferred,
James H. Stanley.
Dated, January 1, 1917.

No. Original Certificate	No. Original Shares	No. of Shares Transferred
16	20	20

Received Certificate No. 125 for 20 Shares, this 12th day of September, 1917.
HOWARD H. MCNEIL

No. 125 — 20 Shares

Incorporated under the Laws of
The State of New Jersey

MORGAN MANUFACTURING COMPANY

Capital Stock.....$200,000
Common Stock...$150,000
Preferred Stock...$50,000

Full-paid and Non-assessable

THIS IS TO CERTIFY that Howard H. McNeil is the owner of Twenty Shares of the Common Capital Stock of the Morgan Manufacturing Company, transferable only on the books of the Company by the said owner thereof in person or by his duly authorized attorney, upon surrender of this Certificate, properly indorsed.

Witness the Seal of the Company and the signatures of its duly authorized officers affixed in Trenton, New Jersey, this 10th day of September, 1917.

{ CORPORATE SEAL }

JAMES CORNISH, *Treasurer*

ANGUS MCDONALD, *President*

Shares, $100 each

Any certificate which clearly indicates the stock it represents and the ownership of this stock, is legally sufficient regardless of its form and style. As a matter of business, however, and of good taste as well, a neat and presentable certificate is always to be preferred.

It is customary for two of the company officials to sign stock certificates; also for the corporate seal to be affixed. The officers to sign stock certificates are usually designated by the by-laws of the corporation, though in some states they are prescribed by statute. The president is always required to be one of the signing officials, and the secretary or treasurer is designated as the other.

The words "full-paid and non-assessable" should not appear upon the face of a stock certificate unless the corporation has been paid in full for the stock which it represents.

Stock certificates are numbered consecutively and are issued in the order of their numbers, not as a matter of legal obligation but merely one of convenience.

The certificates for preferred stock are similar to those for common stock except that the special provisions as to the privileges enjoyed by the holders are printed in full. Usually when a corporation issues both kinds of stock, they are distinguished by having the class printed in large lettering on the certificates.

Stock is transferred by assignment, the form for which is printed or lithographed upon the back of the certificate. This form may be executed in the partially completed condition known as an assignment in blank, and may then pass from hand to hand without further formality.

When the owner of a certificate assigned in blank wishes to become the owner of record of the stock it represents, he completes the assignment by the insertion of his own name as in the following form. He may or may not fill in the name of his attorney at his discretion.

Form 44. Assignment of Stock Certificate

For Value Received, (I) hereby sell and transfer unto (Martin T. Marshall, of New York City, Twenty-five) Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint (Chester A. Slater) my Attorney to transfer the said stock on the books of the within-named Company, with full power of substitution in the premises.

Dated, (October 1, 1917.)
In the presence of: (Ellis K. Doyle.)
(Charles T. Estabrook)

Form 45. Certificate of Incorporation—New York

Certificate of Incorporation
of the
PIEDMONT SCALE COMPANY

We, the undersigned, all being of full age and two-thirds being citizens of the United States and one of us a resident of the State of New York, for the purpose of forming a corporation under the Business Corporations Law of the State of New York, do hereby certify and set forth:

First—The name of said corporation shall be

"Piedmont Scale Company."

Second—The purposes for which said corporation is to be formed are as follows:

(a) To manufacture, buy, sell, import, export, and generally deal in and with scales, weighing machines, and mechanical devices for weighing, measuring, and recording the weight and measurement of all kinds of goods and merchandise.

(b) To apply for, obtain, purchase, or otherwise acquire, and to register, hold, own, use, operate, sell, assign, or otherwise dispose of and turn to account and profit, any and all trade-marks, improvements, inventions, tools, apparatus, mechanisms, and machinery, useful or necessary in the operations of the Company, whether secured under letters patent of the United States or of any foreign country, or held or secured in any other manner.

(c) To take, lease, hire, purchase, manufacture, or otherwise acquire and own, and to sell, hire, lease, pledge, mortgage, and otherwise deal in and with all kinds of goods, wares, chattels, merchandise, and other personal property, excepting gold and silver bullion, foreign coins, and bills of exchange.

Third—The amount of capital stock of said corporation shall be Five Hundred Thousand Dollars ($500,000).

The amount of capital with which said corporation will begin business is Five Hundred Dollars ($500).

Fourth—The number of shares of which said capital stock is to consist shall be Five Thousand (5,000) Shares of the par value of One Hundred Dollars ($100) each.

Fifth—The principal office of the corporation shall be in the Borough of Manhattan and in the City, County, and State of New York.

Sixth—The duration of said corporation shall be perpetual.

Seventh—The number of directors of said corporation shall be three.

Eighth—The names and post-office addresses of the directors for the first year are as follows:

NAMES	ADDRESSES
Howard Maxwell	510 West 176th Street, New York City
Howard J. McCall	270 Broadway, New York City
Edward Blashfield	30 Broad Street, New York City

Ninth—The names and post-office addresses of the subscribers to this certificate and the number of shares which each agrees to take in said corporation, are as follows:

NAMES	ADDRESSES	SHARES
Howard Maxwell	510 West 176th Street, New York City	460
Howard J. McCall	270 Broadway, New York City	20
Edward Blashfield	30 Broad Street, New York City	20

Tenth—At all elections of directors of this corporation, each stockholder shall be entitled to as many votes as shall equal the number of his shares of stock, multiplied by the number of directors to be elected, and he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them, as he may see fit.

IN WITNESS WHEREOF, we have made and signed this Certificate in duplicate, this 27th day of August, in the year One Thousand, Nine Hundred and Seventeen.

HOWARD MAXWELL
HOWARD J. MCCALL
EDWARD BLASHFIELD

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss*:

Personally appeared before me this 27th day of August, 1917, Howard Maxwell, Howard J. McCall, and Edward Blashfield, to me personally known to be the persons described in and who executed the foregoing certificate, and severally acknowledged that they executed the same for the purposes therein set forth.

OSCAR JACOBS,
Notary Public, Suffolk County, N. Y.
Certificate filed in New York County.

{ NOTARIAL SEAL }

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As the general corporate mechanism is much the same in all corporations, there is a general resemblance between their by-laws. The details of these by-laws should, however, in each case be adapted to the special requirements of the corporation for which they are prepared. (See Chapter XLVIII, "By-Laws.")

The set of by-laws which follows, though particularly intended to illustrate the references of the present volume to the by-laws, has been proved by long experience to supply excellent material from which to construct the by-laws of any particular corporation.[1]

Form 46. By-Laws—Simple Form

BY-LAWS

of the

NEW YORK CONSTRUCTION COMPANY

New York City

ARTICLE I—STOCK

1. *Certificates of Stock* shall be issued to each holder of full-paid stock, in form approved by the Board of Directors; shall be numbered consecutively; be issued in numerical order from the stock certificate book; be signed by the President and Secretary, and be sealed with the corporate seal. A record of each certificate issued shall be kept on the stub thereof.

2. *Transfers of Stock* shall be made only upon the books of the Company, and before a new certificate is issued, the old certificate properly indorsed shall be surrendered. Surrendered certificates shall be cancelled and be attached to their proper stubs in the stock certificate book. The stock books of the Company shall be closed to transfers twenty days before general elections and ten days before dividend days.

3. *The Treasury Stock* of the Company shall include such issued and outstanding stock of the Company as may be acquired by purchase, donation or otherwise and shall be held subject to disposal by the Board of Directors. Such stock shall neither vote nor participate in dividends while held by the Company.

ARTICLE II—STOCKHOLDERS

1. *The Annual Meeting* of the stockholders of the Company shall be held in the principal office of the Company in New York City, at 10 o'clock A.M. on the third Monday of January of each year—if not a legal holiday; but if a legal holiday, then on the next business day succeeding —for the purpose of electing directors and the transaction of such other business as may be brought before the meeting.

2. *Special Meetings* of the stockholders shall be held at the principal office of the Company and may be called by the President at his discretion and must be called by him when so directed by resolution of the Board of Directors, or when requested thereto in writing by stockholders holding one-third of the outstanding stock.

[1] A more extended set of by-laws suitable for the larger corporations may be found in the author's work, "Corporate Organization and Management."

3. *Notice of Meetings*, written or printed, for every annual or special meeting of the stockholders shall be prepared and mailed to the post-office address of each stockholder as shown by the stock books of the Company not less than ten days before such meeting, and if for a special meeting such notice shall state the object or objects thereof, and no other business shall be transacted at any such special meeting save that so notified. No failure or irregularity of notice of any regular meeting shall invalidate such meeting or any proceeding thereat.

4. *A Quorum* at any meeting of the stockholders, save as otherwise prescribed by statute, shall consist of a majority of the voting stock of the Company represented in person or by written proxy. A majority of such quorum shall be necessary to decide any question coming before the meeting.

5. *The Election of Directors* shall be held at the annual meeting of stockholders, and shall be by ballot conducted by two inspectors of election appointed, after the first election, by the President.

6. *The Presiding Officer* at meetings of stockholders shall be the President, or in his absence or disability, the Vice-President. In the absence or disability of both of these officers, a Chairman shall be chosen by the stockholders present and shall preside at such meeting.

7. *The Order of Business* at the annual meeting and as far as possible at all other meetings of the stockholders, shall be:

1. Calling of Roll
2. Proof of Due Notice of Meeting
3. Reading and Disposal of Any Unapproved Minutes
4. Annual Reports of Officers and Committees
5. Election of Directors
6. Unfinished Business
7. New Business
8. Adjournment

Article III—Directors

1. *The Business and Property* of the Company shall be managed by a Board of three (3) Directors, who shall be stockholders and who shall be elected annually by ballot by the stockholders for the term of one year, and shall serve until the election and acceptance of their duly qualified successors. Any vacancy in the Board may be filled by the remaining members of the Board for the unexpired term. Directors shall receive no compensation for their services as such.

2. *The Regular Meetings* of the Board of Directors shall be held in the principal office of the Company in New York City at 3 P.M. on the third Tuesday of each month if not a legal holiday; but if a legal holiday, then on the next succeeding business day.

3. *Special Meetings* of the Board of Directors, to be held in the principal office of the Company in New York City, may be called at any time by the President or by any three members of the Board, or may be held at any time and place without notice and for the transaction of any business, by unanimous written consent of all the members, or by the presence and participation of all the members at such meeting.

4. *Notices* of both regular and special meetings shall be mailed by the Secretary to each member of the Board not less than five days before any such meeting, and notices of special meetings shall state the purposes thereof, and no other business shall be transacted at a special meeting save as so notified unless by unanimous consent of all the mem-

bers. No failure or irregularity of notice of any regular meeting shall invalidate such meeting or proceeding thereat.

5. *A Quorum* at any meeting shall consist of a majority of the entire membership of the Board. A majority of such quorum shall be necessary to decide any question that may come before the meeting. If a quorum is not present at any duly assembled meeting, a majority of those present may adjourn the meeting from day to day but may transact no other business until a quorum is secured.

6. *Voting.* Each member of the Board present in person at any meeting shall have one vote upon all matters voted upon at such meeting.

7. *The Presiding Officer* at meetings of the Directors shall be the President, or in his absence or disability, the Vice-President.

8. *Officers* of the Company shall be elected by the Board of Directors at their first meeting after the election of Directors each year. If any office becomes vacant during the year, the Board of Directors shall fill the same for the unexpired term. The Board of Directors shall fix the compensation of the officers and agents of the Company. An officer may be removed at any time by a two-thirds vote of the entire membership of the Board.

9. *The Order of Business* at any regular meeting or special meeting of the Board of Directors shall be:

1. Reading and Disposal of Any Unapproved Minutes
2. Reports of Officers and Committees
3. Unfinished Business
4. New Business
5. Adjournment

Article IV— Officers

1. *The Officers* of the Company shall be a President, who shall be elected from among the directors, a Vice-President, a Secretary, and a Treasurer, all of whom shall be elected for one year and shall hold office until their successors are elected and qualify. The positions of Secretary and Treasurer may be united in one person.

2. *The President* shall preside at meetings of stockholders and of Directors; shall have general supervision of the affairs of the Company; shall sign or countersign all certificates, contracts, and other instruments of the Company as authorized by the Board of Directors; shall make reports to the Directors and stockholders, and perform all such other duties as are incident to his office or are properly required of him by the Board of Directors. In the absence or disability of the President, the Vice-President shall exercise all his functions.

3. *The Secretary* shall issue notices for all meetings of both stockholders and directors; shall keep their minutes; shall have charge of the seal and the corporate stock books; shall sign with the President all instruments requiring such signature; and shall make such reports and perform such other duties as are incident to his office or are properly required of him by the Board of Directors.

4. *The Treasurer* shall have the custody of all moneys and securities of the Company and shall keep regular books of account and balance the same each month. He shall sign or countersign such instruments as require his signature; shall perform all duties incident to his office or that are properly required of him by the Board; and shall give bond for the faithful performance of his duties in such sum and with such sureties as may be required by the Board of Directors.

Article V—Dividends and Finance

1. *Dividends* shall be declared only from surplus profits at such times as the Board of Directors shall direct, and no dividend shall be declared that will impair the capital of the Company.

2. *The Moneys* of the Company shall be deposited in the name of the Company in such bank or trust company as the Board of Directors shall designate, and shall be drawn out only by check signed by the Treasurer and countersigned by the President.

Article VI—Seal

1. *The Corporate Seal* of the Company shall consist of two concentric circles, between which appears the name of the Company, and in the centre shall be inscribed "Incorporated 1917, New York," and such seal, as impressed on the margin hereof, is hereby adopted as the Corporate Seal of the Company.

Article VII—Amendments

1. *These By-Laws* may be amended, repealed, or altered, in whole or in part, by a majority vote of the entire outstanding stock of the Company, at any regular meeting of the stockholders, or at any special meeting where such action has been announced in the call and notice of such meeting.

CHAPTER LXXXVIII

FORMS FOR CORPORATE MEETINGS

Special meetings of directors are usually assembled by means of call and waiver, except where the board is large or some of its members are inaccessible. The common form of call and waiver for directors' meetings is as follows:

Form 47. Call and Waiver for Special Meeting of Directors

CALL AND WAIVER

SPECIAL MEETING OF DIRECTORS

We, the undersigned, all the Directors of the Long Island Power Company of Flushing, Long Island, do hereby call a special meeting of the Board of Directors of said Company to be held in its office at No. 285 Duane St., New York City, at 4 o'clock P.M. on this 22nd day of October, 1917, for the purpose of acting upon a proposition for the sale of the Company's Flushing plant, and we do hereby waive all statutory and by-law requirements as to notice of time, place, and purposes of said meeting, and consent to the transaction thereat of any and all business pertaining to the affairs of the Company.

New York City, N. Y.,
October 22, 1917.

JOHN MCFERGUSON
HAROLD H. HARDING
BENTON CRELLER
HOWARD H. MAURICE
HORACE EVANS

Form 48. Agreement to Consent Meeting of Directors

HARRISON CUTLERY COMPANY

WAIVER OF NOTICE

We, the undersigned, all the Directors of the Harrison Cutlery Company, being now present, do hereby consent to an immediate meeting of the Board of Directors of said Company to be held in the office of Henry H. McCall, No. 253 Broadway, New York, at 3 o'clock P.M. this 15th day of October, 1917, and we hereby waive all requirements as to notice of

time, place, and purposes of such meeting, and agree to the transaction thereat of any and all business pertaining to the affairs of the Company.

HENRY H. MCCALL
SIMON FRANKENSTEIN
JAMES J. MCCALL
HOWARD H. FRENKEL
STANLEY T. BROWN

For such meetings a written validation is not strictly necessary. The participation of all the parties entitled to be present, duly entered on the minutes of the meeting, affords legal evidence of their consent thereto and estops any subsequent objections on their part to the proceedings. As a precautionary measure, however, the secretary should have every member of the board sign the minutes of a consent meeting or, otherwise, sign a waiver of notice and agreement to the meeting as given above.

Form 49. Notice of Special Meeting of Directors

HYDRO-CARBON STEEL COMPANY
134 West 23rd St., New York City

September 15, 1917.

MR. WALTER H. SINCLAIR,
Montclair, New Jersey.

DEAR SIR:—

You are hereby notified that pursuant to call of the President, a special meeting of the Board of Directors of this Company will be held in its office at 3 o'clock P.M. on the 18th day of September, 1917, to act upon a proposition to purchase the plant of the Scranton Foundry Company and to transact such other business in connection therewith as may be necessary or desirable.

Respectfully,
MILTON H. SANDERSON,
Secretary

This notice must be sent to every member of the board. The time, place, and purpose of the meeting must be stated, and, unless every member of the board is present and agrees thereto, no business may be transacted at the meeting save that so specified.

Notice of regular meeting of directors would be similar to

the notice of special meeting, but usually merely states time and place of meeting, omitting purposes.

It is but rarely that publication notices are used in assembling directors' meetings. The foregoing notice might be readily modified, if desired, to serve as a publication notice.

Form 50. Minutes of Special Meeting of Stockholders

MIDVALE FOUNDRY COMPANY
OF
NEW JERSEY

MINUTES OF SPECIAL MEETING OF STOCKHOLDERS
Held November 19, 1917

The stockholders of the Midvale Foundry Company assembled in special meeting in the office of the Company at Midvale, New Jersey, at 10 o'clock in the forenoon on the 19th day of November, 1917, pursuant to call of the President followed by due notice thereof to the stockholders.

The meeting was called to order by Mr. Frederick H. Colgate, President of the Company; the Secretary of the Company, Mr. W. A. Thompson, officiating as recording officer.

The entire capital stock of the Company was represented at the meeting, either in person or by proxy filed with the Secretary.

The Secretary presented the Call and Notice pursuant to which the meeting was held, with his certificate that said notice had been sent out not less than twenty days before the date of meeting. The Call and Notice were ordered spread upon the Minute Book immediately following the minutes of the meeting.

(*Statement of special business should follow with record of action taken.*)

There being no further business, the President declared the meeting adjourned.

FREDERICK H. COLGATE,
President

W. A. THOMPSON,
Secretary

Call and Notice of meeting appended hereto in accordance with the requirements of the foregoing minutes.

W. A. THOMPSON,
Secretary

The general form in which minutes are kept is a matter of custom. The details are determined by the secretary of the particular company. The headings should, however, always be sufficiently full and explicit to show at a glance whether the meeting is of stockholders or directors and whether it is a regular, special, or adjourned meeting.

The name of the corporation is frequently brought in at the head of every set of minutes. When this is not done the minute book should itself be very plainly stamped or marked with the name of the company, which should also appear on the title page of the book and again at the top of the first written page of minutes.

Form 51. Minutes of Regular Meeting of Directors

FAIRFIELD CEMENT COMPANY
OF
NEW YORK

MINUTES OF REGULAR MEETING OF DIRECTORS
Held December 7, 1917

The Board of Directors of the Fairfield Cement Company of New York met in regular meeting pursuant to due call and waiver, in the office of the Company at Fairfield, New York, at 3 o'clock in the afternoon on the 7th day of December, 1917.

The meeting was called to order and presided over by Mr. William A. Pierce, President. The Secretary of the Company, Mr. Morris H. Goodrich, recorded the proceedings of the meeting.

There were present Messrs. William A. Pierce, John H. Pickering, Walter S. Laighton, John K. Bates, Fred N. Barney, Silas H. Harvey, and Morris H. Goodrich, constituting a quorum of the Board.

The Secretary read the minutes of the last regular meeting and, no objection being made, they were ordered to stand approved.

(The regular order of business then follows, and record of action under each head.)

There being no further business before the meeting, it was declared adjourned.

WILLIAM A. PIERCE, *President.* MORRIS H. GOODRICH, *Secretary*

The following forms show motions as they appear in the secretary's minutes. The form is the same for either stockholders' or directors' minutes.

Form 52. Motions

1. MOTION TO RECEIVE PRESIDENT'S REPORT

On motion duly seconded and unanimously carried, the President's report as read was ordered received and filed.

2. Motion Instructing Secretary to Cast Vote

There being no other nominations, the Secretary was instructed by motion unanimously carried, to cast the single ballot of the meeting for the five candidates for Directors already named.

---

3. Motion to Amend By-Laws

By motion unanimously carried, Section 1 of Article II of the By-Laws was amended by changing the hour for the assembling of the annual meeting of the Company from 12 o'clock noon to 3 o'clock P.M.

---

4. Motion to Appoint an Investigating Committee

Moved, that the President be authorized and directed to appoint a committee consisting of three Directors of this Company, to investigate the books and accounts of the Treasurer for the past three years, such committee to have full access to the Company's financial records and to have authority to employ a certified public accountant to conduct the technical work necessary.

.....

An amendment to the by-laws is usually acted upon by means of a resolution. In example 3 above, as the amendment is of minor importance, it is decided by motion.

A formal motion in writing should appear on the minutes in the exact form submitted, and should be introduced by an explanatory statement, as "The following motion offered by Mr. Wilson was duly seconded and carried by unanimous vote."

Form 53. Directors' Resolutions

.....

1. Resolution to Open Bank Account

Resolved, That the Treasurer be and hereby is authorized and instructed to open an account for the Company with the Seaboard National Bank of New York City, and to deposit therein all funds of the Company coming into his possession, such account to be in the name of the Company and funds deposited therein to be withdrawn only by check signed by the Treasurer and countersigned by the President.

---

2. Resolution Authorizing Issue of Stock

Resolved, That the President and Treasurer be and hereby are authorized and directed to issue certificates of the full-paid Capital Stock of this Company to the aggregate amount of Ten Thousand Dollars ($10,000), and to deliver the same to the written order of Robert H. Stuart, Fiscal Agent for the Company, against payment into the treasury of the Company of the full par value thereof.

3. Resolution Authorizing Contract

Resolved, That the President and Secretary be and hereby are authorized and instructed to enter into a contract with the Wilbur Collins Construction Company on behalf of this corporation, for the erection of a power house, the construction of said power house to be in accordance with the plans and specifications on file in the office of this corporation and the cost thereof not to exceed Twenty-Five Thousand Dollars ($25,000), payment thereof to be made as set forth in the written proposition heretofore submitted to this corporation by the said Wilbur Collins Construction Company.

---

4. Resolution Declaring Dividend

Resolved, That the sum of Ten Thousand Dollars ($10,000) be and hereby is appropriated and set aside from the surplus profits of this Company for the payment of the regular Two Per Cent (2%) quarterly dividend upon its outstanding stock, said dividend to be due and payable on the 20th day of October, 1917, to stockholders of record as shown by the books of the Company at the close of business on the 15th day of October, 1917.

Resolved Further, That the Treasurer of this Company be hereby authorized and instructed to give due notice of such dividend and to pay the same when due.

.....

In the following form of certified resolution the resolution appears on the upper part of the sheet followed by the certification.

Form 54. Certified Resolution Designating Bank

.....

(*For Resolution see Form* 53.)

I, Sherman H. Rogers, Secretary of the Allis Drug Company, do hereby certify that the foregoing is a full and true transcript of a resolution duly adopted at a regular meeting of the Board of Directors of the said Company held in the City of New York on the 10th day of November, 1917, as it appears on the minutes of said meeting, and I do further certify that Charles Allis is the duly elected President of said Company, and Jasper T. Huntington is its duly elected Treasurer.

In Witness Whereof, I have hereunto affixed my official signature and the corporate seal of said Company, this 26th day of November, 1917.

{ CORPORATE SEAL }

Sherman H. Rogers,
Secretary

CHAPTER LXXXIX

MISCELLANEOUS CORPORATE FORMS

The signature of a corporate official followed by his official designation is usually referred to as an "official" signature. The name of a corporation duly affixed and evidenced by the signature of the affixing officer or officers is known as a "corporate" signature.

Form 55. Corporate and Official Signatures

(1) OFFICIAL SIGNATURE—INFORMAL
JOSEPH H. McPHERSON,
President

(2) OFFICIAL SIGNATURE—FORMAL
JOSEPH H. McPHERSON,
President HOLLAND TYPEWRITER CO.

(3) CORPORATE SIGNATURE—INFORMAL
(a) RAMSAY WATER COMPANY,
By.....
President
(b) RAMSAY WATER COMPANY,
By HOWARD RAMSAY,
President

(4) CORPORATE SIGNATURE—FORMAL
WESTERN CHEMICAL COMPANY,
By JOSEPH H. McCLEARY,
President
{ CORPORATE SEAL }
FREDERICK WELLMAN,
Secretary

Signature (1) is the simplest form of official signature. It should be used only when the letter or other instrument to which it is appended, shows plainly and unmistakably, by heading or subject matter, of what company the person signing is an official. If this is not the case, the official signature

should be written in full as in signature (2). Corporate signature (3) is in the simplest form. The first of these forms shows a partial corporate signature—usually affixed by means of a rubber stamp—awaiting completion by the insertion of the president's signature as shown in the second form.

When the corporate signature is affixed to important instruments, usually, though not necessarily, two or more official signatures are employed as in (4). The seal is also usually affixed even when not legally necessary.

The corporate signature may be legally affixed by any corporate official or agent authorized thereto by the directors or by-laws. In all current business, however, where but one signing officer is desired, the president is usually designated, unless the transaction pertains specially to the department of some other official.

Signatures affixed to formal instruments are customarily preceded by an explanatory statement termed a "testimonium clause."

Form 56. Testimonium Clause

In Witness Whereof, the said Powell Steel Company has caused its corporate name to be hereunto subscribed by its President and its duly attested corporate seal to be hereunto affixed by its Secretary, all in the City of Hartford, State of Connecticut, on the 25th day of August, 1917.

{ CORPORATE SEAL }

Powell Steel Company,
By Alexander H. McDowell,
President

Attest Seal:
Franklin B. Lord,
Secretary

When corporate acknowledgments are taken, the notary should not be an officer or stockholder of the corporation. The form of acknowledgment is usually regulated by statute and therefore varies in almost every state of the Union.

Resignations may be divided into two general classes: those which are so phrased as to be completely effective without an acceptance, which may be termed peremptory resignations, and those which are tentative in their nature and therefore not effective until accepted. The following form is of the latter nature.

Form 57. Resignation of Director

To the Board of Directors of the
HOWARD SCALE COMPANY:

GENTLEMEN:—

On account of my continued ill health, which prevents my proper attention to the duties of the position, I hereby tender my resignation as a member of your body.

Very respectfully,

HENRY H. GALE

New York City,
September 29, 1917.

If a resignation of this kind is accepted without qualification, its effect is immediate, and the resigning director, though present at the meeting, ceases to be a director at the moment the resolution or motion of acceptance is adopted. A party tendering such a resignation has the right to withdraw it or to revoke it at any time prior to its acceptance.

The following resignation terminates the official status of the party signing same as soon as the document is filed with the secretary of the company. No action of the board is required, nor can the board in any way prevent its effect.

Form 58. Resignation of Director—Peremptory

To the Board of Directors of the
FRANKLIN ELECTRIC CORPORATION:

GENTLEMEN:—

I hereby resign my position as a director of the Franklin Electric Corporation, my resignation to take immediate effect.

Respectfully,
WILLIAM H. COLLINS

New Brighton, Pa.,
October 22, 1917.

A committee report, unless of considerable length, is usually presented and read. If too lengthy to permit of this, and of sufficient importance to justify the expense, it is printed for distribution.

Form 59. Report of Committee on By-Laws

TERREBONNE CEMENT COMPANY

REPORT OF COMMITTEE ON BY-LAWS

To the Stockholders of the
TERREBONNE CEMENT COMPANY:

GENTLEMEN:—

Your committee appointed at the last annual meeting of the stockholders to report any needed modification in the By-laws of this Company, begs to submit the following:

1. We would recommend the addition of a By-law providing for an Executive Committee, to consist of three members of the Board of Directors, such Committee to have full control of the general business affairs of the Company in the interim between meetings of the Board.

2. We would recommend that the present By-law relating to the regular meetings of the Board of Directors be so changed as to provide for quarterly meetings instead of monthly meetings as at present.

3. We strongly disapprove of the suggested amendment to the By-laws whereby the amount of indebtedness which may be incurred by the directors on behalf of the Company at any one time is increased from $10,000 to $25,000, as we believe such change to be not only unnecessary but against the interests of the Company.

Respectfully submitted,

JAMES F. GOUGH
HARKNESS B. LEWIS
OLIVER H. SIMPSON
Committee on By-laws

The treasurer's certifications to matters relating to the corporate finances are usually in the form of affidavits.

Form 60. Treasurer's Affidavit—Corporate Statement

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss.:*

On this 19th day of February, 1918, personally appeared before me, a Notary Public in and for the County of New York, Walter L. Hood, Treasurer of the Hood Scale Company, who, being duly sworn, did depose and say that he has full charge and control of the books and accounts of

the said Company; that the above and foregoing statement is taken from said books and accounts; that it is a true and accurate transcript therefrom; and that to the best of his knowledge and belief it is a just and correct presentation of the financial condition of said Company on this date.

WALTER L. HOOD

Sworn to before me the
day and year aforesaid.

JAMES H. STEELE,
Notary Public for
New York County, No. 994.

{ NOTARIAL SEAL }

Term expires February 15, 1919.

.....

This affidavit follows the statement on the same sheet, or on the last sheet if the statement extends over several pages.

CHAPTER XC

REAL AND PERSONAL PROPERTY

Form 61. Chattel Mortgage

.....

CHATTEL MORTGAGE

KNOW ALL MEN BY THESE PRESENTS:

That I, Harry J. Thomas, of New Rochelle, New York, am indebted unto W. H. Richards, of New York City, New York, in the sum of Eighty-Five Dollars ($85), being for goods sold and delivered to me: Now, for securing the payment of the said debt, and interest from the date hereof, to the said W. H. Richards, I do hereby sell, assign, and transfer to the said W. H. Richards all the goods, chattels, and property described in the following schedule, namely,

(*List of property*)

Said property now being and remaining in the possession of myself, at my store, No. 165 Orchard Street, New Rochelle, New York.

Provided always, and this mortgage is on the express condition, that if the said Harry J. Thomas shall pay to the said W. H. Richards the sum of Eighty-Five Dollars ($85), within one year and six months from the date hereof, with interest at Six Per Cent (6%) per annum, which said sum and interest the said Harry J. Thomas hereby covenants to pay, then this transfer is to be void and of no effect; but in case of non-payment of the said sum at the time or times above mentioned, together with interest, then the said W. H. Richards shall have full power and authority to enter upon the premises of the said party of the first part, or any other place or places where the goods and chattels aforesaid may be, to take possession of said property, to sell the same, and the avails (after deducting all expenses of the sale and keeping of the said property) to apply in payment of the above debt; and in case the said W. H. Richards shall at any time deem himself unsafe, it shall be lawful for him to take possession of such property and sell the same at public or private sale, previous to the time above mentioned for the payment of said debt, and apply the proceeds as aforesaid, after deducting all expenses of the sale and keeping of said property. If from any cause said property shall fail to satisfy said debt, interest, costs, and charges, the said Harry J. Thomas hereby covenants and agrees to pay the deficiency.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal, this eleventh day of February, nineteen hundred and eighteen.

HARRY J. THOMAS [L.S.]

In the presence of:
GEORGE H. GOODWIN.

(Notarial acknowledgment in due form if required.)

Form 62. Lease

LEASE

This Agreement of Lease made this 8th day of February in the year 1918, between John K. Robinson of Yonkers, New York, and Henry Smith of Yonkers, New York.

WITNESSETH, that the said Robinson does demise unto the said Smith, all of that dwelling-house and land situate

(*Full description*)

from the first day of April, 1918, for the term of three years next ensuing, the said lessee, Smith, to pay therefor during the said term the rent of Four Hundred and Fifty Dollars ($450) yearly, payable in equal monthly instalments of Thirty-Seven Dollars and Fifty Cents ($37.50) on the first day of each month, the first instalment to be paid on the first day of April next.

The said lessee covenants to pay the rent in the manner above stated; that he will not assign without leave; that he will leave the premises in good repair, necessary wear and tear excepted; that the premises shall not be used during the said term for any other purpose or purposes than those above specified; that he will pay all bills for gas used upon the premises during the said term; that at the expiration of the said term, he will deliver to said lessor, his agents or assigns, quiet and peaceable possession of the said premises, and that the lessor may re-enter for default of ten days in the payment of any instalment of rent, or for the breach of any covenant herein contained.

Witness the following signatures and seals.

JOHN K. ROBINSON [L.S.]
HENRY SMITH [L.S.]

(*Notarial acknowledgment in due form.*)

Form 63. Deed with Full Covenants

DEED

THIS INDENTURE, made the 21st day of January, nineteen hundred and eighteen, between Arthur Elliott of Ithaca, New York, party of the first part, and Grant Allen of Oyster Bay, New York, party of the second part:

WITNESSETH, that the party of the first part, in consideration of Three Thousand Dollars ($3,000), lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, his heirs and assigns forever, all . . . .

(*Description*)

Together with the appurtenances and all the estate and rights of the party of the first part in and to said premises;

To have and to hold the premises herein granted unto the party of the second part, his heirs and assigns forever.

And said Arthur Elliott covenants as follows:

First. That said Arthur Elliott is seized of said premises in fee simple, and has good right to convey the same;

Second. That the party of the second part shall quietly enjoy the said premises;

Third. That the said premises are free from incumbrances;

Fourth. That the party of the first part will execute or procure any further necessary assurance of the title to said premises;

Fifth. That said Arthur Elliott will forever warrant the title to said premises.

IN WITNESS WHEREOF, the party of the first part has hereunto set his hand and seal the day and year above written.

In presence of: ARTHUR ELLIOTT [L.S.]

A. M. WYCKOFF

(*Notarial acknowledgment in due form.*)

.....

Form 64. Real Estate Mortgage

.....

MORTGAGE

THIS MORTGAGE, made the 15th day of February, nineteen hundred and eighteen, between Daniel H. Coler of Yonkers, New York, the mortgagor, and Charles Fenner of the same place, the mortgagee.

WITNESSETH, that to secure the payment of an indebtedness in the sum of Twelve Hundred Dollars, ($1,200), lawful money of the United States, to be paid on the 15th day of February, nineteen hundred and twenty, with interest thereon to be computed from date, at the rate of six per centum (6%) per annum, and to be paid the mortgagee, according to a certain bond or obligation bearing even date herewith, the mortgagor hereby mortgages to the mortgagee . . . .

(*Description*)

And the mortgagor covenants with the mortgagee as follows:

1. That the mortgagor will pay the indebtedness as hereinbefore provided.

2. That the mortgagor will keep the buildings on the premises insured against loss by fire for the benefit of the mortgagee.

3. That no building on the premises shall be removed or demolished without the consent of the mortgagee.

4. That the whole of said principal sum shall become due after default in the payment of any instalment of principal or of interest for thirty days, or after default in the payment of any tax, water rate, or assessment for ten days after notice and demand.

5. That the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver.

6. That the mortgagor will pay all taxes, assessments, or water rates, and in default thereof, the mortgagee may pay the same, and all amounts so paid shall be added to the amount already secured by this mortgage.

7. That the mortgagor, within five days upon request in person or within ten days upon request by mail, shall furnish a statement of the amount due on this mortgage.

8. That notice and demand or request may be in writing and may be served in person or by mail.

9. That the mortgagor warrants the title to the premises.

IN WITNESS WHEREOF, this mortgage has been duly executed by the mortgagor.

In presence of: DANIEL H. COLER [L.S.]

ANNA B. TYLER

(*Notarial acknowledgment in due form.*)

The foregoing instruments affecting realty are made according to "short forms." It is safest always to look up the matter and find out what forms can be used in the particular state where the land transferred is situated. The forms of deeds, mortgages, and notarial acknowledgments are prescribed by law in each state. It is always easier and less trouble to follow precedent in legal matters; in other words, to keep in the well-worn ruts and not to try experiments.

CHAPTER XCI

SUNDRY FORMS

In any settlement of a matter in dispute, it is prudent to provide evidence to show that the matter is finally decided. Frequently a simple receipt for any amount paid "in full settlement of all claims" is enough. Where a more formal instrument is desired, a release is drawn up in the form following. Sometimes the parties exchange releases, so that each may have written evidence of the settlement.

Form 65. General Release

.....

GENERAL RELEASE

TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN, GREETINGS:

KNOW YE, That I, A. B. Corey of New York City, for and in consideration of the sum of Sixty Dollars ($60), Twenty Dollars ($20) of which has heretofore been received by me, and Forty Dollars ($40) to me in hand paid, by Harvey M. Price of New York City, the receipt whereof is hereby acknowledged, have remised, released, and forever discharged, and by these presents do for myself, my heirs, executors, and administrators, remise, release, and forever discharge, the said Harvey M. Price, his heirs, executors, and administrators, of and from any and all manner of action and actions, suits, debts, dues, sums of money, accounts, bonds, bills, contracts, damages, judgments, claims, and demands whatsoever, in law or in equity, which against said Harvey M. Price I ever had, for, upon, or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the date of these presents.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 18th day of February, one thousand, nine hundred and eighteen.

A. B. COREY

Sealed and delivered
in the presence of
MARY A. LAKE

Form 66. Will

.....

I, Russell Sage, of the City and State of New York, do hereby make, publish and declare this my last Will and Testament, in manner and form following:

First: I direct that all my just debts and funeral expenses be paid as soon after my decease as conveniently can be done.

Second: I give and bequeath to my sister, Fanny Chapin, wife of Samuel Chapin, of Oneida, New York, should she survive me, the sum of Ten thousand ($10,000) Dollars.

Third: I give and bequeath to each and every of my nephews and nieces of my own blood me surviving the sum of Twenty-five thousand ($25,000) dollars; and in the event that any of such nephews or nieces shall have died before me, leaving lawful issue him or her surviving, then I give and bequeath a like sum of Twenty-five thousand ($25,000) dollars to the surviving lawful issue of each nephew or niece so dying before me, the same to be distributed among such issue share and share alike, per stirpes and not per capita.

Fourth: All the rest, residue, and remainder of my estate, real, personal and mixed, wheresoever situate, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, I give, devise and bequeath to my wife, Margaret Olivia Sage, to have and to hold the same to her, absolutely and forever.

Fifth: This provision for my wife is to be in lieu of all right of dower in my estate.

Sixth: I authorize and empower my executors hereinafter named, and the survivors and survivor of them, to sell and dispose of all or any of the real estate of which I shall die seized or possessed, at public or private sale, at such times and on such terms and conditions as they, the survivors or survivor of them, shall deem meet or proper, and to execute, acknowledge and deliver all proper writings, deeds of conveyance and transfers therefor.

Seventh: Should any of the gifts and bequests made by me in the second and third paragraphs of this my will lapse or fail for any reason, I direct that the bequests so lapsing or failing shall go to and form part of my residuary estate, and be disposed of under and in accordance with the provisions of the fourth paragraph of this my will.

Eighth: I nominate, constitute and appoint my wife, Margaret Olivia Sage; Dr. John P. Munn, of the City of New York; Almon Goodwin of said City, and Charles W. Osborne long my confidential and trusted assistant, the survivors and survivor of them, executrix and executors of this my last Will and Testament.

In the event of the death, refusal or inability to act of said Charles W. Osborne, I hereby nominate and appoint Edward C. Osborn, also for some years past in my employment, as Executor in his place and stead. I further direct that none of the persons above named as executors shall be required to give any bond or security for the proper discharge of their duties.

Ninth: I hereby authorize and direct my said executors to rent a suitable office for the transaction of the business of my estate, and to employ and pay out of the funds of my estate all the clerks and bookkeepers that may be necessary for the proper care and management thereof.

Tenth: I hereby revoke all former or other wills and testamentary dispositions by me at any time heretofore made.

Eleventh: Should any of the beneficiaries under this my will, other than my said wife, object to the probate thereof, or in any wise, directly or indirectly, contest or aid in contesting the same, or any of the provisions thereof, or the distribution of my estate thereunder, then and in that event I annul any bequest herein made to such beneficiary, and it is my will that such beneficiary shall be absolutely barred and cut off from any share in my estate.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal at No. 2 Wall Street, New York City, Borough of Manhattan, this eleventh day of February, 1901, in the presence of Edward Townsend and Richard W. Freedman, whom I have requested to become attesting witnesses hereto.

Russell Sage [seal]

The foregoing instrument was subscribed, sealed, published, and declared by Russell Sage as and for his last Will and Testament, in our presence and in the presence of each of us, and we, at the same time, at his request, in his presence and in the presence of each other, hereunto subscribe our names and residences as attesting witnesses this 11th day of February, 1901.

Edward Townsend, 130 West 121st St., New York.
R. W. Freedman, 32 West 123rd St., N. Y. City.

.....

Form 67. Agreement for Arbitration

.....

Agreement for Arbitration

This Agreement made this 8th day of February, 1918, between J. S. Thompson and Arnold Baker, both of Brooklyn, New York.

Witnesseth, that whereas there is now between the said parties a controversy in relation to . . . .

(*State fully here the matter in dispute.*)

Now, therefore, the said parties do hereby submit the said difference to the arbitration of Clifford Wilson, James Emerson, and Henry Harland, or any two of them, and they do mutually covenant and agree with each other that the award to be made by the said arbitrators shall be obeyed and observed by each of them.

It is understood and agreed that the said award shall be made in writing, under the hands of the said abitrators, or any two of them, and shall be delivered to said parties on or before the 15th day of the present month.

It is further agreed that said arbitrators, or any two of them, may at their discretion award the expenses and cost of this reference and assess the same on either or both of the said parties.

In Witness Whereof, the parties hereto have, on the day and date aforesaid, hereunto affixed their signatures and seals in the City of Brooklyn.

Witness:
William T. Johnson

J. S. Thompson [L.S.]
Arnold Baker [L.S.]

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